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THE LAW
OF
MINES AND MINING
IN
THE UNITED STATES

BY
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VOLUME II

1911
THE KEEFE-DAVIDSON CO.
NATIONAL LAW BOOK CO.
ST. PAUL, MINNESOTA

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DANIEL MOREAU BARRINGER

AND

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PREFACE.

During the interval that has elapsed since the publication of the first volume of this work, the case law bearing on the subject of the law of mines and mining has so increased that the number of cases decided by the courts of this country, dealing with that subject within the past thirteen years, equal, if they do not exceed, the number reported in the previous fifty years. It has seemed to us that the requirements of the active practitioner, the person to whom this work is especially addressed, could best be served by collecting this new material in a supplemental volume, and arranging it in exact conformity with the plan of the first volume, so that its use in connection therewith would be easy and convenient. With this end in view, the present volume has been prepared. The division into chapters and subdivisions is identical with that of the original volume. At the beginning of each subdivision the corresponding page of Volume I. is printed in black letter type. By this means, the same part of Volume I. can be referred to, and the matter in both volumes on any particular subject can be read together. In addition, references are made in parentheses to those cases in the first volume which have been subsequently reversed, overruled, affirmed or modified. The Appendix contains the Federal Statutes enacted since 1897, and the most recent Land Office regulations.

As in the first volume, the aim has been, not to give the subject scientific treatment, but merely to give a complete and accurate statement of the special rules of law which have been deduced by the application of general rules to the questions that arise as to the rights and duties of miners and mine owners

PREFACE.

in their relation to the land, to one another, and to those in contact with whom they are brought, by reason of the business of mining. Where the statement of these rules, as they appear in Volume I., have not been modified by subsequent decisions, the authors have avoided their repetition. They have confined themselves, in the text which is printed in larger type, to the statement of the effect of the later decisions upon these rules. In using this volume, therefore, the reader should in every instance consult the corresponding chapter and division of Volume I., and in using Volume I. he should in turn refer to the corresponding chapter and division of this volume for the later decisions, and their effect on the law.

D. M. BARRINGER,
JNO. STOKES ADAMS.

Philadelphia, January, 1911.

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THE
LAW OF MINES AND MINING
IN THE UNITED STATES.

VOLUME II.

CHAPTER I.

**PROPERTY IN MINERALS WHERE THERE HAS BEEN NO DIVISION
BETWEEN THE OWNERSHIP OF THE SURFACE AND
THE MINERAL ESTATE.**

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| <p>I. Property and Rights of the Owner of the Soil in Minerals which are in Place.</p> <p>II. Property in Minerals which have been Severed from the Freehold.</p> <p>III. Property and Rights in the Minerals of Owners of the Soil who have a Limited Estate.</p> | <p>A. Tenants for Life.</p> <p>B. Tenants for Years.</p> <p>C. Owners of Equities of Redemption.</p> <p>IV. Property and Rights in the Minerals where there are Joint Owners of the Soil.</p> <p>V. Property and Rights in Mineral Oil and Natural Gas.</p> |
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**I. PROPERTY AND RIGHTS OF THE OWNER OF THE SOIL IN MINERALS WHICH
ARE IN PLACE.**

p. 4. An aërolite or meteorite belongs to the owner of the soil on which it falls. It is deposited there by natural agencies and becomes part of the realty and remains such until severed therefrom (Goddard v. Winchell, 86 Iowa, 71, 52 N. W. 1124, 11 Am. St. Rep. 481, 17 L. R. A. 788; Oregon Iron Co. v. Hughes, 47 Or. 313, 81 Pac. 572, 8 A. & E. Ann. Cas. 556).

Colorado.

Bogart v. Amanda Consol. Gold Min. Co., 32 Colo. 32, 74 Pac. 882 (1903). Until there has been a severance of estates, "ownership of the surface carries with it ownership of the minerals beneath the surface."

Missouri.

Glencoe Land & Gravel Co. v. Hudson Bros. Com. Co., 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 560, 36 L. R. A. 804 (1897). MacFarlane, J.: "Sand and gravel, while in its original bed, is as much a part of the realty as the earth itself. After it has been mined or separated from the land, it may become the subject of conversion; not before."

Pennsylvania.

Delaware & Hudson Canal Co. v. Hughes, 183 Pa. 66, 38 Atl. 568, 63 Am. St. Rep. 743, 38 L. R. A. 826 (1897). "The general principles regulating the titles to upper and lower estates in the earth's crust are pretty well settled by our own cases. The ownership of the surface carries with it, if there be no obstacle to the application of the general rule, title downwards to the center of the earth and upwards indefinitely. So long as mineral deposits remain in place they are part of the freehold, and pass with it by deed, gift or other form of conveyance; but when the minerals are removed from their position or bed by mining they become personal property and are sold like other personal chattels."

Virginia.

Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020 (1896). See this case under chap. II, div. I.

**II. PROPERTY IN MINERALS WHICH HAVE BEEN SEVERED FROM THE
FREEHOLD.**

p. 5. As to property in oil and gas, see chap. I, div. V.

United States.

Waskey v. McNaught, 90 C. C. A. 289, 163 Fed. 929 (1908). 9th Circ. Sand and gravel bearing gold which have been excavated from placer ground and deposited on the surface, and from which the gold has not yet been separated, are still a part of the realty. "The removal of the sand and gravel from one part of the mine to another is not such a severance from the realty as to make it personalty." An injunction which restrains rocking, sluicing, mining, or in any manner working upon the premises, covers the working of this material.

Illinois.

Smoot v. Consolidated Coal Co., 114 Ill. App. 512 (1904). See this case under chap. II, div. I.

Missouri.

Glencoe Land & Gravel Co. v. Hudson Bros. Com. Co., 138 Mo. 439, 40 S. W. 93, 60 Am. St. Rep. 500, 36 L. R. A. 804 (1897). See this case on page 2.

Pennsylvania.

Delaware & Hudson Canal Co. v. Hughes, 183 Pa. 66, 38 Atl. 568, 63 Am. St. Rep. 743, 38 L. R. A. 826 (1897). See this case on page 2.

Lehigh Coal Co. v. Wilkesbarre & E. R. Co., 187 Pa. 145, 41 Atl. 37 (1898). Culm in a culm bank is personal property. It has been mined from its original place and though it rests on the land, is as completely severed as a kiln of bricks in a brickyard or a pile of pig iron in a foundry.

Russell v. Howe, 30 Pa. Super. Ct. 591 (1906). Where iron ore is mined under a lease, the title to it vests absolutely as personal property in the lessee as soon as it is mined and removed. Ore so mined and stored on a wharf was sold by the lessee's assignee for the benefit of creditors. The lease having been forfeited, a subsequent owner of the land claimed this ore, but it was held to belong to the purchaser from the assignee.

III. PROPERTY AND RIGHTS IN THE MINERALS OF OWNERS OF THE SOIL WHO HAVE A LIMITED ESTATE.

A. Tenants for Life.

B. Tenants for Years.

C. Owners of Equities of Redemption.

A. Tenants for Life.

p. 8. Notwithstanding the criticism to which it has been subjected, the arbitrary rule of the common law, which is based on the resolution in *Saunders's Case*, 5 Co. Rep. 22, remains unimpaired; and unless he be without impeachment of waste, tenant for life may not take minerals from the land, unless the mines had been opened before the inception of the particular estate.

This rule has been subjected to a considerable strain when it has been applied to land whose minerals have been disposed of by the modern lease. The previous owner may not himself have mined. He may have made a lease of the underlying minerals under which operations may not have begun. He may, by deed or will, have empowered a trustee to sell or lease the minerals. These acts have, by a fiction, been treated as constructive open-

ings of the mines. A better understanding of the result is attained by recognizing that they give rise to conditions to which the principal rule is inapplicable, and which are governed by other rules. There are four classes of cases which have arisen where mining leases have been made of land in which or in the profits of which life interests have been created.

First. If land is conveyed or devised in trust for one for life with remainder over, and power of sale or lease is given to the trustee, who exercises his power by leasing the minerals, the rent or royalty accruing therefrom is income and as such belongs to the life tenant (*Eley's Appeal*, 103 Pa. 300; *Wentz's Appeal*, 106 Pa. 301; *McClintock v. Dana*, 106 Pa. 386; *Shoemaker's Appeal*, 106 Pa. 392; *Bedford's Appeal*, 126 Pa. 117, 17 Atl. 538; *Dorr v. Reynolds*, 26 Pa. Super. Ct. 139; *Raynolds v. Hanna*, 55 Fed. 783).

Second. If the owner of land conveys the minerals in fee simple in consideration of a royalty, and then by will or deed creates a life estate, this is a life estate in the surface only, and the royalty, being purchase money, is personalty and belongs either to the grantor or to his estate as the case may be (*Fairchild v. Fairchild*, 9 Atl. 255; *Lazarus' Estate*, 145 Pa. 1, 23 Atl. 372).

Third. If the owner of land leases the minerals, that is, if he conveys an interest therein which does not amount to a fee simple, and then by will or deed creates a life estate, the rent or royalty is income and belongs to the life tenant, whether the mines were actually opened before the beginning of his estate or not (*Woodburn's Estate*, 138 Pa. 606, 21 Atl. 16, 21 Am. St. Rep. 932; *Priddy v. Griffith*, 150 Ill. 560, 37 N. E. 999, 41 Am. St. Rep. 397).

Fourth. If the life tenant and remaindermen of land, which has not been worked for minerals, join in a lease of the minerals on royalty, this is corpus, and as such is accumulated, the life tenant being entitled to the income thereon and the principal going to the remaindermen after the termination of the life estate (*Blakley v. Marshall*, 174 Pa. 425, 34 Atl. 564; *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292).

United States.

Higgins Oil & Fuel Co. v. Snow, 51 C. C. A. 267, 113 Fed. 433 (1902). 5th Circ. Under the intestate laws of Texas, the surviving husband or

wife of an intestate is entitled to one-third of his personal estate absolutely and one-third of his "land" for life. Held that the life estate in the land extended to all minerals beneath the surface of the land.

At common law a life tenant may continue to work mines that were open when the tenancy commenced, but he may not open new mines. "The authorities all agree that there is no restriction when the land has once been used for mining purposes before the life tenant comes in; and they now go a step further, and hold that mining will be allowed if the owner of the preceding estate has fixed on it the character of mining land by lease or the like, though no mines were opened."

In this case, after the death of the intestate and before dower was assigned to his widow, the remaindermen, being also the owners of seventeen-eightieths absolutely, took possession of the entire property to the exclusion of the life tenant and converted it into an oil field. It was held that the widow might elect to acquiesce in the changing of the mode of use of the property and was entitled to an accounting of the profits of the wells during her lifetime, even though no operations were commenced prior to the death of the intestate. Whether she was entitled to one-eightieth of the net yield absolutely or to have that share impounded and put at interest, the interest to be paid to her during life and the corpus to be reserved for the remaindermen, is not decided, but a receiver pendente lite was appointed for this share.

Barnsdall v. Boley, 119 Fed. 191 (1902). C. C. N. D. West Va. A tenant by the curtesy has only a life estate in the realty, which entitles him to the possession thereof, but does not authorize him to enter into a contract with any one to explore and drill wells on the property for the purpose of extracting and taking from it petroleum oil, or to lease the land for that purpose.

Illinois.

Ohio Oil Co. v. Daughetee, 240 Ill. 361, 88 N. E. 818 (1909). A tenant for life has no right to operate for oil on the land. The opening of new mines upon land by a life tenant amounts to waste, and the same rule applies to oil wells, oil being a mineral and part of the realty. Neither may a trustee who holds the legal title for the benefit of the life tenant operate the land for oil. He will be enjoined from so doing at the suit of the remainderman, even though the interest of the latter be contingent.

Indiana.

Andrews v. Andrews, 31 Ind App. 189, 67 N. E. 461 (1903). A tenant for life, being entitled to the profit of the land, is entitled to the royalties from the wells that were opened and in operation when the life estate commenced. Where there have been no operations for oil commenced on the land before the estate for life accrued, the life tenant has no right to operate for oil, nor can he give such a right to any lessee from him.

A testator having in his lifetime leased lands for oil and gas purposes devised a life estate in such lands. No wells had been drilled by the

lessees at the time of the testator's death, but they had paid a stipulated annual rental to the testator up to the time of his death. This rental would be payable to the life tenant during the delay in beginning operations, and if the lands had been developed and the wells in operation under the lease prior to the time the life estate accrued, the royalty would be payable to the life tenant. The life tenant's right to the rents and profits from open wells rests upon the lawfulness of the severance and conversion of the oil into personalty under the lease. Although the wells may not be drilled, yet, if the right to drill them exists at the beginning of the life estate, the life tenant is entitled to the rental or royalty, for the opening of new wells under the lease would be practically the act of the testator, and, he having authorized the act by the lease, in contemplation of law the wells may be treated as already opened when the life estate accrued.

Richmond Natural Gas Co. v. Davenport, 37 Ind. App. 25, 76 N. E. 525 (1905). The extraction of oil or gas from land by one lawfully in possession of the surface thereof, with the right to enjoy the income and profits, but not being the owner in fee and not having received from the owner in fee the privilege to take the oil or gas (that is, by a tenant of the land for years or for life), constitutes waste and will be enjoined at the suit of the owner in fee.

Where oil or gas has been taken from land by means of wells by the owner in fee, or he has by contract given to another the right to so take it, and thereafter the possession devolves upon a tenant for life, such tenant may enjoy the use of such lease or royalties therefrom during his tenancy as profits and income from the land in the condition in which it comes to him as life tenant. But where no operations for oil or gas have been carried on by the owner of the fee, or his grantee or lessee for such use, and he has not granted such right during his ownership of the fee, a tenant for life has no right to operate for oil or gas, or by lease or grant give authority to another to do so. The fact that possibly by the operations upon neighboring lands all the oil and gas will be taken before the remaindermen come into possession cannot affect their right to prevent the taking by the lessee or the grantee of the life tenant.

Iowa.

Hook v. Garfield Coal Co., 112 Iowa, 210, 83 N. W. 963 (1900). A life tenant may work pits or mines that have already been opened but he may not open new ones. Those already opened he may work even to the point of exhaustion. He may sink new shafts upon mines already opened, but may not open new veins.

A person to whom is devised a life estate in the testator's property, but with the restriction that she is not to sell any of the real estate, may not execute a mining lease (there being then no open mines on the land) in which the lessee is given the right to remove all the merchantable coal from the lands. "The coal underneath the surface was a part of the real estate, and the lease thereof, in the form in which it was executed, was a transfer

thereof. * * * We need not determine whether it passed title to unmined coal, for that question is not in the case. It surely passed title to all that was mined and was, therefore, a sale of real estate."

Kentucky.

Gerkins v. Kentucky Salt Co., 100 Ky. 734, 19 Ky. Law Rep. 130, 39 S. W. 444, 66 Am. St. Rep. 370, modifying 36 S. W. 1 (1897). The owner of a life estate in land, who was also one of the remaindermen, leased it for the purpose of boring for gas, and the lessee with the knowledge of two of the other five remaindermen, and with the consent of another, erected expensive machinery for operating the well.

While unquestionably the life tenant had no right to make the lease, yet to close the well would not only entail great loss on the lessee, but by reason of the nature of gas would not benefit the remaindermen.

"The contract of lease should be treated as void as against appellants, and after the Company has been reimbursed for the improvements, * * * appellants should receive a fair royalty for any further operation of the well by the Company; otherwise it must be closed."

Gerkins v. Kentucky Salt Co., 23 Ky. Law Rep. 2415, 67 S. W. 821 (1902). In an action for an accounting under the decree entered in *Gerkins v. Kentucky Salt Co.*, 100 Ky. 734, 19 Ky. Law Rep. 130, 39 S. W. 444, 66 A. S. R. 370, it was held that, in determining the compensation to be thus paid for the use of the well, the actual value of the gas was the criterion. The cost of exploiting the product and providing for its care and use must be taken into consideration. The owners of the land are entitled only to the crude material, unenhanced by the additional circumstance of provision for its practical use as made by the lessee, since the latter acted in good faith in the honest belief that it had title to the land under its lease. The owners are entitled only to compensation, that is the fair equivalent of the thing taken at the time and at the place of the conversion, in the condition that it was in, without the aid of expenditure of labor or means upon it by the converter.

Roberts v. Armstrong, 19 Ky. Law Rep. 300, 40 S. W. 459 (1897). Life tenant gave to a turnpike company a right of way over the land and the right to use the surface stone for the construction of the pike for \$265. It being clear that the company could not build the road through this land without the consent of the life tenant or without paying damages to her, and that \$265 was not more than fair compensation for the damages sustained by her, it was error for the court below at the suit of remaindermen to enjoin the payment to the life tenant; the life tenant was entitled thereto.

Missouri.

Hill v. Ground, 114 Mo. App. 80, 89 S. W. 343 (1905). If the owner of the fee in land has opened the mineral veins and extracted ores therefrom for commercial purposes, the life tenant may continue the process, even to

the exhaustion of the mine. But where the life tenant receives the land with the mine unopened, he cannot open the mines; if he thereafter enters into a contract with the reversioner to open the mine and divide the profits, and the mine is opened but not worked, the status prior to the contract is restored. Then the value of the life interest is fixed by the value of the land for other purposes than mining.

Ohio.

Kenton Gas & Elec. Co. v. Dorney, 17 Ohio Circ. Ct. R. 101 (1898). A tenant for life has no power to lease land for oil and gas purposes. For such a tenant to contract away the mineral part of the land is waste, and forfeits the life estate to the reversioner.

Willford v. Heimhoffer, 25 Ohio Circ. Ct. R. 748 (1902). Where the heirs of a decedent join with his widow in executing an oil lease on land of which he died intestate, and afterwards the land is partitioned and the widow's dower assigned and confirmed to her, she is entitled to the oil produced from the land so assigned to her, irrespective of the question as to whether the wells thereon were opened before or after her husband's death.

Pennsylvania.

Maffet's Estate, 8 Kulp, 184 (O. C. Luzerne Co.) (1896). A decedent having in his lifetime by lease in which his wife joined demised all the coal under a tract of land, the royalties therefrom were purchase money of real estate, and under the intestate laws the widow was entitled to one-third thereof absolutely.

Another lease made by the decedent and his wife having been forfeited for nonpayment of royalties, the executor and the widow made a new lease of "all the mineral coal" under this tract. The widow had a right to one-third the income from this lease as dower, the mine being an open one. This right has no dependence upon a subsequent continuance or discontinuance of working either by the husband or those claiming under him.

The executor was therefore ordered to assign to the widow an equal undivided one-third part or interest in both leases.

Maffet Estate, 9 Kulp, 136 (1897). Where a widow filed her petition for a conveyance to her of an undivided one-third interest in two leases executed by her deceased husband in his lifetime, she is held to be entitled to the same, the court laying down the general rule that "A demise of all the merchantable coal, all the workable coal, all the mineral coal, or all the coal which can be removed by prudent, skillful and proper mining, in, under and upon a described piece of land is a sale of the coal, and the royalties are purchase money of real estate, and under our intestate laws the widow is entitled to one-third absolutely."

In re Estate Joseph S. Brown, 27 Pitts. Leg. J. (N. S.) 228 (1896). The testator had made a lease of certain coal with power to mine to exhaustion and rent payable annually. The question arose between the life tenant and remainderman whether such rent belonged to the corpus of the estate or

was income. The court held that a sale had been made thereof in testator's lifetime and the rentals accruing belonged to the corpus.

"The cases relating to the characters in which coal and its proceeds shall be regarded readily fall into four classes:

"(a) Those in which the coal has neither been severed by contract from the surface, nor opened for mining; and therefore constitutes part of the corpus of the land.

"(b) Those in which mines have been opened by the owner who was an occupant of the land, and his widow takes under the intestate law a share in the coal actually mined during her life. * * *

"(c) Those in which the proceeds of so-called leases made by the owners of land have been treated after death as part of the corpus of the personal estate; and of these *Lazarus' Estate*, 145 Pa. 1, is the leading case; and

"(d) Those in which the proceeds of leases made by virtue of testamentary power have been treated as income; and of this *Eley's Appeal*, 103 Pa. 300 is the leading case."

Fahnestock's Estate, 22 Pa. Super. Ct. 63 (1903). Where a testator by his will gives his wife the rents and income of his real estate until the same is sold, and directs that all of his real estate shall be sold within a specified period of years, the wife is entitled to income arising from a portion of the lands by the sale of timber and leasing of coal rights until such portion is sold, it appearing that the testator knew that the only income which could be derived from such lands was from the sale of timber and coal rights.

In re Duffy's Estate, 209 Pa. 390, 58 Atl. 840 (1904). On January 7, 1896, Lawrence Duffy died. At his death he was the owner of the undivided half interest in a tract of coal land. In his lifetime he and his co-owner, Patrick Lenahan, by an agreement dated June 1, 1895, had leased the coal under the land at a price of 35 cents per ton payable monthly, not less than a fixed quantity to be mined annually or contract forfeited. The purchasers went into possession and mined coal up to the date of the lessor's death and afterwards. On December 7, 1893, about four years before his death he had made his will in which he had devised to his wife, Winifred, "during her life the use of all my interest which interest is the undivided one-half in the coal" underlying the tract, with the remainder to his nephew. It follows that this devise of the land to the wife carried with it the testator's rights under the lease during the wife's life; it was a devise to her of the land for life, and by his death subsequent to the contract it passed to her the monthly payments on the land as directly as if the devise had been a farm out of which the owner received an annual rental during his lifetime. So that it is immaterial whether we call the contract a lease, or a sale of the coal in place, or a contract passing a right to the coal, the price to be measured by a minimum monthly royalty or rent; it clearly put in the widow the full enjoyment for life of the use of all his interest in the coal, and the period of her enjoyment commenced immediately at her husband's death. * * *. But the words of the

devise import a different estate in the land than the ordinary title or right; it in effect points out the manner of its enjoyment. She is to have the use of the coal underlying the land; she could have no other use of it except to mine or sell it. She was, therefore, free from any impeachment of waste by the remainderman. She was entitled to receive the royalties directly without having them pass through the hands of the executor as trustee (*Duffy's Estate*, 17 Pa. Super. Ct. 244 [1901]).

Dorr v. Reynolds, 26 Pa. Super. Ct. 139 (1904). See this case under chap. II, div. IID.

In re McFadden's Estate, 224 Pa. 443, 73 Atl. 927 (1909). The owner of twenty-four hundred acres of coal land died, leaving a will by which he gave his estate to a trustee to invest, reinvest and keep the same safely invested, and to pay the net income to his wife during life. Before his death he had leased a part of this land for mining purposes and a mine had been opened thereon. This mine having become exhausted, the trustee, under the authority of the court, made a lease to the same lessees of the coal in another portion of the land adjoining that which was first leased. It was held that the royalties received under the latter lease, being a conveyance of all the coal underlying the described tract of land, was a sale thereof, and that the royalties received therefor represented the purchase price and should be treated by the trustee as principal.

"The settled rule that it is not waste about which remaindermen can complain for a life tenant to work an open mine to exhaustion has no application to the facts of the case at bar. It is very doubtful whether the widow here is a life tenant within the meaning of the rule. The common-law rule rested on a very different foundation. It had its origin in a case where the testator had devised a tract of land, limited in area, on which was an open mine, to one for life, and then over to others. The question arose whether it was waste for the life tenant under these circumstances to mine, use and sell coal from a mine opened in the lifetime of testator. It was held not to be waste and that the life tenant had the right to pursue the mine even to exhaustion. This rule found favor in our earlier cases and has become a rule of property in Pennsylvania. There is no disposition to weaken or destroy it and it must be considered as settled law when the facts of a case justify its application. The rule, however, has its limitations, and must not be unduly and unreasonably extended." "In the present case there was an outstanding lease for a limited number of acres belonging to the testator at the time of his death upon which there was a mining operation. There were at least two openings on this property, but these lands were segregated from the other lands of the testator by the lease itself, and there can be no reason in law or equity why the rule should be extended beyond the boundaries fixed by the testator himself. We hold, therefore, that there was no open mine in the lifetime of the testator on the lands included in the lease of 1908 and the rule as to the rights of a life tenant does not apply. The royalties received, or to be received, under the terms of this lease, are principal and not income and should be so regarded and treated."

Deffenbaugh v. Hess, 225 Pa. 638 (1909). A tenant by the curtesy has no right to open and mine coal from lands which he holds for life when they were unopened and unmined at the time of the death of his wife. He nevertheless has a life estate in the underlying coal as a part of the land, and the remainderman has no right to enjoy any portion of it without his consent. A tenant by the curtesy and the remainderman joined in a deed of the land, reserving the underlying coal. They subsequently joined in another deed conveying the coal. The tenant by the curtesy is entitled to receive the whole of the income derived from the purchase money arising from the latter conveyance.

"When, what had not been productive or profitable to either the life tenant or the remainderman became so by an act of the latter, permitted by the former, the right of each continued to be the same in the portion of the land made productive and profitable. When the vein was sold the purchase money took its place as land, and the interest of the life tenant followed it in its changed form, from which, without committing waste, he could derive enjoyment. Such enjoyment will not impair the vested right of the remainderman, and upon the death of the life tenant, the money will pass undiminished to the former, just as the land, if not sold, would have passed uninjured by waste."

Texas.

Swayne v. Lone Acre Oil Co., 98 Tex. 597, 86 S. W. 740, 8 A. & E. Ann. Cas. 1117 (1905), affirming *Lone Acre Oil Co. v. Swayne* (Tex. Civ. App.) 78 S. W. 380 (1903). Rev. St. 1895, art. 1689, provides that a surviving wife of an intestate shall be entitled to an estate for life in one-third of the land of the intestate, with remainder to the children of the intestate. Where such remaindermen drill oil wells on the land during the lifetime of the widow, but no wells had been drilled at the time of the intestate's death, the widow is entitled to receive only the income for life on one-third of the product of the wells, the principal or product itself going to the remaindermen.

Virginia.

Bond v. Godsey, 99 Va. 564, 39 S. E. 216 (1901). G. was tenant by the curtesy of an undivided interest in a tract of land, the chief value of which consisted in its timber and coal, the latter not having been opened or developed. The guardian of the remaindermen and the owners of the other undivided interest, being minors, brought su't for the sale of the land and the ascertainment of G.'s interest. In his answer G. expressed his willingness to take a gross sum in the proceeds of the sale in lieu of his life estate. It was held that in estimating this the value of the minerals should be deducted from the value of the land, on the ground that a life tenant has no interest in and no right to open and work unopened mines.

West Virginia.

Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694 (1897). Life tenant of land has not the right to extract oil therefrom. "Petroleum oil, in its place in the land, is a part of the land itself, just as are coal, timber and iron (*Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222). A tenant for life cannot do anything entailing permanent injury to the estate of the remainderman or reversioner. He cannot, therefore, dig for gravel, lime, clay, stone, or the like; cannot open new mines for minerals. 1 Lomax, Dig. 54. If he take clay to make brick, not for repair of buildings, but for sale, it is waste (*University v. Tucker*, 31 W. Va. 622, 8 S. E. 410). It is the duty of the life tenant to protect the land from waste or injury even from others, and he must abstain from so doing himself. * * * Therefore when J. himself committed waste by boring for oil, he was a wrongdoer, so far as concerns his life estate. The remainderman could sue him in an action of waste, as at common law under the English Statute of Malbridge, or in an action of trespass on the case under chapter 92 of the code, and recover the full value of the seven-tenths." There having been no open well on the land, and no antecedent authority to bore one, *Koen v. Bartlett*, 41 W. Va. 559, 23 S. E. 664, 56 Am. St. Rep. 884, 31 L. R. A. 128 (see vol. 1, p. 15), is not applicable to this case. "It may occur that, if J. could not [bore for oil] his life estate would be worthless to him. The oil might be drawn off by wells on an adjoining tract. As life tenant is he entitled to none of it. Such is the quality of that estate."

Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781; *Wilson v. Hughes*, 39 L. R. A. 292 (1897). Y. by his will devised a tract of land to his widow for life, remainder to H. for life, remainder to the children of H. Oil having been discovered upon adjoining lands, the guardian of the remaindermen, who were minors, under 3239, chap. 83, Code of West Virginia, petitioned the circuit court for leave to sell his wards' interest in the oil and gas underlying the land, and obtained leave to lease the land for oil purposes for a term of years upon royalty, one-third of which was to be delivered to him and two-thirds to the life tenants.

Held that the life tenants were not entitled to any part of the royalties, but only to the interest thereon during their lifetime. *Blakely v. Marshall*, 174 Pa. 425, 34 Atl. 564 (see vol. 1, p. 14), followed.

"She had no right to open a mine on the land she held, as life tenant, unless the same had been opened in the lifetime of her husband. This, however, had not been done; and not having the right to open and work a mine that had not been opened in the lifetime of her husband, it follows, that she could not confer that right upon another. Oil in place under the land, * * * has been held in this State to be a part of the realty, and as much so as timber, coal, iron ore or salt; that it is a part of the inheritance, and an unlawful removal thereof is a disherison of him in re-

mainder, constituting waste, which a court of equity, in a proper case, will restrain and enjoin."

Eakin v. Hawkins, 52 W. Va. 124, 43 S. E. 211 (1902). The interest of a life tenant in the proceeds of royalty oil taken from the premises is the interest on the fund during his natural life.

Where petroleum oil is extracted from land, conveyed to a person for life and remainder in fee to his heirs, under a lease from the life tenant, and a sale of the interest in the remainder by order of a court of chancery in a proper proceeding for the purpose reserving in the lease and order of sale one-eighth of the oil for the owners of the land, it is not error to decree, to the life tenant or his grantees, in another suit, the royalty oil or proceeds thereof, to hold until the expiration of the life tenancy, and take the income thereof, and then pay over the corpus of the fund to those entitled in remainder.

B. Tenants for Years.

p. 15. It is provided in the Code of Georgia 1895, § 3114, that "if no object of the lease is stated, the mining interest will not pass unless the circumstances justify an implication of such intention in the parties."

California.

Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 Pac. 317 (1905). Oil is a mineral and as a mineral is part of the realty when in place. Its severance and removal, except in proper cases, is waste. A lease without reference to minerals, mines, etc., is a lease merely of the superficies of the soil, and under such a lease the tenant has no right to remove oil.

Indiana.

Waldorf v. Elkhart & W. R. Co., 13 Ind. App. 134, 41 N. E. 396 (1895), followed in *Elkhart & W. R. Co. v. Waldorf*, 17 Ind. App. 29, 46 N. E. 58 (1897). The owner of a tract of land upon which were a brick making plant and a bed of clay, already opened, conveyed it to the railroad company, reserving the right of possession for a period of one year, except a right of way 66 feet wide. Held this reservation gave not only the naked possession but the use and enjoyment of the land which included the right to dig clay.

"It is settled law that tenants for life or years are entitled to work mines, quarries, clay pits or gravel beds, which have been opened and used before the time of commencement of the particular estate." "This rule is founded upon the principle that the holder is entitled to use and enjoy the land according to the previous and accustomed method. The opening of new mines would be waste, but the working of the old ones is a simple continuation of the use of the land made by the owner."

C. Owners of Equities of Redemption.

p. 17.

United States.

Traer v. Fowler, 75 C. C. A. 540, 144 Fed. 810 (1906). 8th Circ. During the period of redemption of real estate sold under foreclosure and execution in Illinois, the mortgagor or judgment debtor is entitled to the possession and rents and profits of the property. Where the property is a mine, the rule for the admeasurement of rents and profits is the same as in cases involving the rights of dower and of life tenants. "Coal in its natural state beneath the surface of the earth is, under the laws of Illinois, real estate, and foreclosure, and execution sales of it are subject to redemption. When opened for mining purposes it is a mine whether it is so described in the mortgages and conveyances of it or not, and when it is and has long been operated through adjoining lands it is as much an opened mine as though a working shaft had been sunk to it from the surface of the land above it. The petition in this case contains no averment that the coal taken by the receiver during the period of redemption was not secured by the ordinary and reasonable operation of the opened mine which contained the mortgaged coal in the same way in which it had been worked before the receiver was appointed. It therefore fails to state a cause of action against the receiver because all the coal thus mined was the property of the mortgagor, and neither the purchaser at the foreclosure sale nor the subsequent redemptioner nor the plaintiff, its assignee, ever acquired any right to or interest in it, or in the possession of the mine during the period of redemption while the receiver was extracting it."

Pennsylvania.

Martin's Appeal, 9 Atl. 490 (1887). Mortgagor will be enjoined from removing sand and stone from the land. This is waste against which the mortgagee is entitled to protection until by reduction of the amount of the mortgage or other means he is sufficiently secured from probable loss.

Real Estate Trust Co. v. Hatton, 194 Pa. 449, 45 Atl. 379 (1900). Upon a bill in equity by mortgagee against mortgagor, the latter will be enjoined from digging clay on the mortgaged premises, if it will cause a material depreciation in the value of the property.

IV. PROPERTY AND RIGHTS IN THE MINERALS WHERE THERE ARE JOINT OWNERS OF THE SOIL.

p. 18. In Missouri and in West Virginia, where by statute tenants in common are liable to their cotenants for waste, the taking of minerals from the land is waste. This also seems to be the case in Iowa, where a mine has not theretofore been opened.

The ground of this distinction, however, is not clear. Where such waste has been committed, the offending cotenant must account for the net profits; and the result is practically the same as in those states where mining is not waste, and where the tenant in common may lawfully mine, but must account to the cotenant for the value of the mineral in place. In those states where mining is waste, it would no doubt be enjoined at the suit of a cotenant.

In determining the measure of compensation due by a cotenant who takes minerals from the joint property, the standard applied in *Coleman's Appeal*, which in Pennsylvania is held to be exceptional, has been applied to the case of placer mining in Alaska, and has also been adopted in New York. The rule that the just basis of account is the value of the ore in place, and the true representative of that is the royalty which should be obtained for the privilege of mining, which prevails in Pennsylvania, cannot in view of the above departures from it be stated as of general application.

United States.

Higgins Oil & Fuel Co. v. Snow, 51 C. C. A. 267, 113 Fed. 433 (1902). 5th Circ. See this case on page 4.

Dettering v. Nordstrom, 78 C. C. A. 157, 148 Fed. 81 (1906). 9th Circ. One of several cotenants has no right to waste the substance of the mine. He has the right to operate the mine, but with it goes the obligation to account for the output less the reasonable expenses of mining, and the burden of proving those expenses is on him. The rule laid down in *Fulmer's Appeal*, 128 Pa. 24, 18 Atl. 493, 15 Am. St. Rep. 662 (vol. 1, p. 28), was held to be inapplicable to this case, and *Coleman's Appeal*, 62 Pa. 252 (vol. 1, p. 26), was followed, "There is no evidence in the record that there was any fixed royalty for mining placer claims in the region in which the mine in question was situated." Expert testimony was rejected; it was common knowledge in Alaska that no two placer mines contained the same amount of gold, and it could never be certainly known what would be found beneath the surface of any claim.

Dangerfield v. Caldwell, 81 C. C. A. 400, 151 Fed. 554 (1907). 4th Circ. "It is undoubtedly true that it is within the power of a court of equity to order the partition in kind of a tract of land known to have oil or gas, or both, under its surface, but the question will always arise as to whether in the interest of the parties such partition can and ought to be made." "The finding of gas upon the property tends to make it evident that the land cannot be equitably divided in kind." Such partition was denied in this case

where wells had been sunk by some of the cotenants, and it was shown that the value of the several parts would be greatly destroyed thereby.

Alabama.

Moragne v. Moragne, 143 Ala. 459, 39 So. 161, 111 Am. St. Rep. 52, 5 A. & E. Ann. Cas. 331 (1905). Where a tenant in common conveys his interest in a tract of land to his cotenant, reserving mineral rights, the cotenancy in the minerals is not disturbed, and it requires some open, notorious assertion of claim by the vendee to the mineral and some direct interference with or denial of the vendor's right thereto to constitute an ouster of him so far as the mineral is concerned. Until this occurs he has a right to assume that the vendee is holding in accordance with the terms of the deed.

Colorado.

Wolfe v. Childs, 42 Colo. 121, 94 Pac. 292, 126 Am. St. Rep. 152 (1908). One cotenant, without the consent of the other cotenants, cannot demand from those who have not joined with him, or in some way given their consent, remuneration for expenses incurred in prospecting or developing the mineral resources of the common property. While the operating tenant may, in case he is called upon to account for profits, set off as against the others the cost of the necessary improvements, he must show that such improvements were necessary and added to and enhanced the value of the common property. It is well settled that tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property, in the absence of a special agreement or mutual understanding to that effect.

Illinois.

Zeigler v. Brenneman, 237 Ill. 15, 86 N. E. 597 (1908). One tenant in common may not operate for oil against the protest or without the consent of the other tenants in common.

An oil and gas lease made by one cotenant without the knowledge of the others, and which purports to be of the entire premises, is void as against the other cotenants; but as between lessor and lessee is valid, even while the premises remain undivided. It is only when and so far as the lease comes in conflict with the interests of the other cotenants that it is void. Such a lease being valid as to the interest of the one cotenant, though void as to the others, if he subsequently joins the others in a lease to a third person with notice, no title to his interest passes to the new lessee. In such case each lessee has a valid lease as to the interests of his lessor, and while neither can have partition, they may, by agreement with each other, operate for oil while the premises remain undivided, or any lessor may have partition, and the leases will follow the interests of the lessors, thereby giving each lessee the sole right to operate in his respective lots. But unless these leases agree as to operation, or one of the lessors procures partition, neither lessee may operate the property.

Iowa.

Hook v. Garfield Coal Co., 112 Iowa, 210, 83 N. W. 963 (1900). A widow who takes as her interest in her husband's estate an undivided one-third of land in fee, as cotenant with the heirs, has no right to lease the whole for mining purposes. "Dower rights exist in mines already opened during the husband's lifetime, and under our statute, giving the widow one-third in fee, she is entitled to all minerals found on her third after it has been ad-measured. Until there has been an allotment in severalty, a cotenant has no right to use or sell coal found under the entire tract, when the vein has not heretofore been opened." See this case further on page 6.

Kansas.

Compton v. People's Gas Co., 75 Kan. 572, 89 Pac. 1039 (1907). A widow owned an undivided half interest in land, the other half of which belonged to her children, and a part of which was occupied as a homestead. She conveyed her interest in the oil and gas privileges subject to the rights of those occupying the place as a homestead. Subsequently, when the youngest child became of age, she joined with her children in making an oil and gas lease of the same premises to another party. The latter lease conveyed only the interest of the children. Both lessees were entitled to possession of the premises to extract oil and gas; neither was entitled to exclusive possession.

New York.

McCabe v. McCabe, 18 Hun, 153 (1879). A tenant in common, who, having quarried and sold stone from the land, brings an action of partition, will be required to account therefor to his cotenants in that action. "These acts of the plaintiff are very different from mere occupancy. They are consumptive or destructive of the very property which is owned in common. It may be necessary to adhere to the rule that for mere occupancy the cotenant shall not be liable to account. But there is no reason to extend the rule to a case where the cotenant actually consumes or takes off and disposes of a part of the property held in common."

Cosgriff v. Dewey, 164 N. Y. 1, 58 N. E. 1, 79 Am. St. Rep. 620 (1900), affirming 21 App. Div. 129, 47 N. Y. Supp. 255 (1897). The general rule that a tenant in common is not liable to his cotenants for ordinary use and occupation of the common premises, in the absence of agreement to pay, or for ouster or exclusion of his cotenant, unless there has been the commission of waste, does not apply to a case where the occupant removes a part of the freehold itself.

Where one tenant in common quarries trap rock, removes and sells it, he is liable to his cotenant for the value of a proportionate amount of the rock removed and sold, less the cost and expenses of removal, and the latter may maintain an action for an account thereof.

Pennsylvania.

McGowan v. Bailey, 179 Pa. 470, 36 Atl. 325 (1896). The owner of land, upon which was an open coal mine, died intestate, leaving a widow and children. The grantees of the children entered upon the land and mined the coal without objection on the part of the widow. After nearly all the coal was mined she brought a bill in equity for an account under the act of April 25, 1850, P. L. 573. Held that the defendants were accountable as cotenants, and not as trespassers. "Unless there be a severance of the inheritance, she cannot treat her cotenants as trespassers, merely because they have actively managed the common estate, and have received the whole of the rents or proceeds."

"Here both parties had an interest in the land; the defendants being one of the tenants in common, and as is said by Sharswood J. in *Coleman's Appeal*, 62 Pa. 252: 'A tenant in common exercises his undoubted right to take the common property, and he has no other means of obtaining his own just share than by taking at the same time the shares of his companions. The value of the ore in place is therefore the only just basis of account.' But as in the case before him, no evidence had been given as to the value of the ore in place, the finding of the master that the value of the ore at the mine's mouth, after deducting the expenses of putting it there, was adopted as an equitable basis on which to state the account."

The defendants were trustees for the plaintiff's share of the proceeds of the coal and could not plead the statute of limitations as a bar to her right.

Byers v. Byers, 183 Pa. 509, 38 Atl. 1027, 41 Weekly Notes Cases, 358, 63 Am. St. Rep. 765, 39 L. R. A. 537 (1898). A parol partition is valid if complete and executed. Tenants in common may make such partition of their land either by vertical or by horizontal lines. "There is no difference in the right, nor in any other respect except in facility of proof of the intent, inasmuch as the ordinary mode is by vertical lines, and therefore such partition is more readily presumed, and acts done in pursuance of it on the surface are more easily shown." "The jury should have been instructed that the parties had the right to make such partition as they chose, either of the whole land or of the surface only, that the presumption was that they parted the whole, but that presumption would give way to the intention of the parties, and it was for the jury to determine from all the evidence what the parties intended to include in the partition."

Schreiber v. National Transit Co., 21 Pa. Co. Ct. Rep. 657 (1899). Where tenants in common refuse to join their cotenant in operating oil lands, or to bear any of the expense thereof, the latter must account to his cotenants only for the customary oil royalty paid to landowners in the vicinity; the cotenants cannot claim the same interest in the oil which they hold in the land.

Hanna v. Clark, 204 Pa. 149, 53 Atl. 758 (1902). Where part of the lands involved in an action of partition are subject to prior leases for oil purposes, the oil will not be partitioned, but only the land. The interest in

the lands and in the leases were separate and independent; the one real, the other personal (*Wettengel v. Gormley*, vol. 1, p. 77).

Tennessee.

Harlan v. Central Phosphate Co., 62 S. W. 614 (1901). A lease by one tenant in common of the mineral rights in the common property, without the consent of all cotenants, is binding upon the tenant in common who makes it, but cannot in any way impair the rights of tenants who did not join or consent thereto. "This statement needs some explanation. In the authorities the discussion seems to turn upon the principle * * * that one tenant in common cannot convey a distinct portion of the common property by metes and bounds. It is true that a conveyance of this character cannot be used to the prejudice of the other tenants, but it is good thus far: If in a subsequent partition of the property that portion so previously conveyed by metes and bounds shall fall to the vendor of that interest, the vendee will have a good title thereto. He cannot insist, as a matter of right, that such portion shall be assigned to the share of his vendor, yet he is a proper party in a partition suit, to the end that his interests may be protected; and other things being equal, there is little doubt that a court of equity would so arrange the property as to protect him. Of course, however, when he buys an interest of this character, he incurs the risk of losing it, because it may not fall to the share of his vendor. * * * The same rule will apply as to mineral rights. *"

* * Of course, it is true that some holdings may be of such a character that they cannot be enjoyed in common, but will have to be sold. *

* * But whether partible or not, still the conveyance of such an interest would not be void as against the vendor, and would suffice to convey whatever rights he might have in the minerals upon a division. * *

* One tenant in common has himself the right to mine and he can convey the same right to another, subject, however, to such regulations as a court of equity may find it necessary to make in order to protect the rights of the other tenant." The decision in *Adam v. Briggs Iron Co.*, 61 Mass. (7 Cush.) 361 (vol. 1, p. 21), is disapproved.

West Virginia.

Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694 (1897). J. claimed to be the owner in fee of certain land and bored wells thereon for the production of oil. It was found that he owned three undivided tenths in fee and the other seven-tenths belonged to the plaintiffs, subject to an estate for life in J.

"By the old law one tenant in common was not liable to another for waste; but our Code of 1891 (chapter 92, § 2) has remedied this unreasonable rule by making tenants in common, joint tenants and parceners, liable for waste. 1 Lomax, Dig. 499; 2 Minor Inst. 620." The extraction of oil is waste. J's act, therefore, was tortious. Waste is an

injury to the freehold by one rightfully in possession. This marks the distinction between waste and trespass. "But the nature of the act is a tort in both cases; the same in both. Of course, a stranger would be liable for trespass; or if he converts the oil from realty to personalty the injured cotenant may waive the trespass, and go for the value of the oil or for the money for which the trespasser sold it." J., by repudiating the cotenancy of the plaintiffs, placed himself in the position of a stranger. "It is therefore immaterial to define his exact caste; whether we regard him as a tenant in common or stranger it is the same. If oil wells had been already opened, J., as cotenant, might set up claim under his three-tenths' interest to work them, and take all profits under some cases;—though I should think he would have to account under section 14, chapter 100, Code. That would be no wrong; not waste. His life tenancy would give him the right to take all the oil. But there were no open wells on it, nor any precedent authority to open any. He first pierced the soil in quest of this fluid of fabulous wealth. He had no right to pierce it to get even his three-tenths of the oil. If he chose to do so, of every gallon seven-tenths belonged to the owners of seven-tenths in the land, because it had been part of their soil. These considerations repel all idea that as owner of the fee in three-tenths, he could penetrate the soil, and convert to his sole use, without accounting, all the oil raised. It is true, an expression in a former opinion in this case (see vol. 1, p. 29) said that J., as the owner of three-tenths had a right to bore for oil, so he took no more than his share. This is not announced as law in the syllabus. On examination I find no warrant for this expression. The only materiality for this is that it may be claimed to enter into the process of the accounting for the oil, as, if its extraction was lawful, the charge against J. might be different from what it would, if he be regarded as a wrongdoer."

"It may be said that these doctrines would leave the part owner powerless to get any benefit from the oil. If so, it must be as a quality of his estate. But it is not so; for, if he wished a partition, he was entitled to it, and thus could bore on his separate share, and take the oil on it, and perhaps drain all from the other, and hold it acquit of account for it; and if he did not want partition, oil being capable of loss from wells on lands near by, perhaps he could ask a court of equity to allow him to bore, and take his share of the oil, and pay the balance to the remainderman, like that jurisdiction exercised by equity to direct timber in a state of decay to be cut down for the benefit of those entitled to the inheritance, if it would do no damage to the life tenant, compensating him for the use of the land."

Equity had jurisdiction in this case to compel an accounting, which must be not for annual rent but for a share of the rents and profits. J., having acted with notice of the rights of the plaintiffs, would not at law be entitled in this accounting to credit for expenditures made by him in the development of the land and the production of oil, but in equity he may be allowed these credits, and required to account only for net rents and

profits. "It is not inconsistent to allow him as a set-off expenses of production, including not merely handling the oil, but the cost of boring productive wells, under the particular circumstances of the case, namely, that by reason of the energy and risk of J. he developed this hitherto worthless land into an oil field of almost amazing wealth, yielding far beyond the cost of development, and leaving to go to the plaintiffs large returns." This case is followed in *Dangerfield v. Caldwell*, 81 C. C. A. 400, 151 Fed. 554 (1907). 4th Circ. (See p. 15 above).

Cecil v. Clark, 47 W. Va. 402, 35 S. E. 11, 81 Am. St. Rep. 802 (1900). Extraction of coal by one tenant in common without consent of another is waste for which he must account to that other.

If one tenant in common take coal from land without the consent of another, he cannot keep the proceeds of the sale of the coal, without accounting, on the theory that the portion of land furnishing the coal is no more than his just share.

McNeely v. South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480 (1905). While at common law tenants in common, joint tenants and coparceners, are not liable for waste, by the law of this state they are so liable. The basis of accounting between them for waste, effected by the extraction of oil from the common property under circumstances which make it reasonably certain that the party taking the oil acted without fraud and under belief of title in himself to the whole of the property, although not without notice of defect of title, is the value of the oil produced, less the entire cost of its production.

If one cotenant executes an oil lease covering the whole of the common property, and the lessee produces oil and pays royalty to his lessor, both may be required to make reparation to the injured cotenant.

Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762 (1909). For one tenant in common to extract oil from the land is waste, which is a wrong by statute. Code 1906, § 3390. The other tenants may sue at law or maintain a bill for an injunction. As to an injunction in all cases, "The authorities are divided. But we must remember that we have the statute. In some cases he may be required to resort to an action for his share." Though one of several co-owners may mine, it does not follow that the lessee of one co-owner may take oil as against the other co-owners.

V. PROPERTY AND RIGHTS IN MINERAL OIL AND NATURAL GAS.

p. 30. The proposition that there can be no property in any particular body of oil or gas until it is reduced to actual possession is adhered to in all the oil and gas producing states. The logical deduction from this proposition, that a distinct estate in fee cannot be created in oil and gas in place separate from the estate in the surface, is reached in Indiana and Pennsylvania.

In those states, at least, ejectment will not lie for these minerals. In West Virginia and Texas, however, the courts have held that these fugitive minerals are susceptible of the same kind of ownership as the solid minerals, and separate estates may be created in them.

The right of a landowner to an unlimited production of oil or gas without regard to the effect that his operations may have upon neighboring property by reason of his draughts upon a common reservoir has been generally upheld, and the loss occasioned thereby held to be *damnum absque injuria*. It is true that this right is subject to the limitations which the law imposes on the use of all property rights. (*Hague v. Wheeler*, vol. 1, p. 33.) But for the mere act of withdrawing oil or gas from beneath the neighboring land or from the common source of supply of the neighborhood, there is usually no redress. (See *Jones v. Forest Oil Co.*, 194 Pa. 379, 44 Atl. 1074, 48 L. R. A. 748, below.) In Indiana it has been sought by statute not only to prevent the mere waste of natural gas, but to protect the rights of all owners to the common reservoir by forbidding the use of artificial means to increase the natural flow. (11 Harvard L. R. 265; 14 Id. 155.) Steps in the same direction are the statutes which require the plugging of abandoned oil wells. Arkansas, Act May 6, 1905, p. 635; Illinois, Act May 16, 1905, p. 326; Indiana, Burns' Ann. St. 1908, §§ 2710, 9062-9069; Kentucky, Acts 1891-1893, p. 60; Statutes 1899, §§ 3910-3914; *Com. v. Trent*, 117 Ky. 38, 77 S. W. 390 (1903); Ohio, Act February 9, 1893, 90 Ohio Laws, 24; *State v. Oak Harbor Gas Co.*, 53 Ohio St. 347, 41 N. E. 584 (1895); Bates Ann. Rev. St. 1906, §§ 306, 4379; Pennsylvania, Act June 10, 1881, P. L. 110; *Bartoe v. Guckert*, 158 Pa. 124, 27 Atl. 845 (1893); *Steelsmith v. Aiken*, 14 Pa. Super. Ct. 226 (1900); *Dawson v. Shaw*, 28 Id. 563 (1905). In a recent case in Kentucky, however, in which a wanton waste, conducted with the motive of injuring another owner, was enjoined, the advanced position has been taken that each landowner should be limited to a reasonable use of the gas from a common reservoir. (See page 29 below; 17 Harvard L. R. 283. See, also, a criticism of *Hague v. Wheeler* in 7 Harvard L. R. 369.) The language of the Indiana courts, as quoted below, looks in the same direction.

United States.

Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 Law. Ed. 729 (1900), affirming *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627. The provision in the act of March 4, 1893, of the state of Indiana, "that it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes, or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well, and thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles," is not a violation of the Constitution of the United States; and its enforcement as to persons whose obedience to its commands were coerced by injunction is not a taking of private property without adequate compensation, and does not amount to a denial of due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, but is only a regulation by the state of Indiana of a subject which especially comes within its lawful authority.

White, J., after quoting with approval *Brown v. Spilman*, *Brown v. Vandegrift*, *Westmoreland Co. v. DeWitt*, *Hague v. Wheeler*, *State v. Indiana & Ohio O. G. & M. Co.*, *Jamieson v. Indiana N. G. & O. Co.*, and *Peoples' Gas Co. v. Tyner*. "If the analogy between animals *ferae naturae* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *ferae naturae* belong to the 'negative community;' in other words, are public things subject to the absolute control of the State, which, although it allows them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking. *Geer v. Connecticut*, 161 U. S. 519, 525, 40 Law. Ed. 793. But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession. The identity, however, is for many reasons wanting. In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to

possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer v. Connecticut*, supra. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply, the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste."

Kansas Natural Gas Co. v. Haskell, 172 Fed. 545 (1909). C. C. E. D. Okla. In declaring unconstitutional a statute which prohibited corporations having the right of eminent domain to use the highways of the state to construct gas pipe lines, from transporting or transmitting any natural gas to a point outside of or beyond the state, the court said, "the contention of defendants that the natural gas found within the territorial limits of the state is the common heritage of the people of the state, which may be conserved and preserved by the state as trustee of those things in which the people have a common interest, as flowing streams, wild animal life, etc., is unsound and must be denied. On the contrary, it must be held he who by lawful right reduces to his possession mineral, gas, or oil has the same absolute right of property therein, with the same power of barter, sale, or other disposition, including, of necessity, the right of transportation and delivery under such reasonable rules and safeguards as the exigencies of the case may demand and the state employ, as the farmer has of his corn, his wheat, or his stock, or the merchant of his wares, and such absolute right therein as the state cannot deny him without making just compensation, and any attempt to so do would be in violation of the fourteenth amendment to the federal Constitution."

Illinois.

Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144 (1908). "In the eye of the law oil and natural gas are treated as minerals, but they possess certain peculiar attributes not common to other minerals which have a fixed and permanent situs. Owing to their liability to escape these minerals are not capable of distinct ownership in place. Oil and gas while in the earth, unlike solid minerals, cannot be the subject of a distinct ownership from the soil. A grant to the oil and gas passes nothing which can be the subject of an ejectment or other real action. It is a grant not of the oil that is in the ground, but to such part thereof as the grantee may find." See this case also on page 79.

Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46 (1908). Oil and gas are classed as minerals and that term is not confined to metallic substances, but, on account of the wandering and vagrant nature of oil and gas and their liability to escape or to be withdrawn to other lands, they are not subject to absolute ownership. They belong to the owner of the land under which they are located so long as they remain there, but when they escape and go under other land the title of the former owner is lost. See this case also on page 80.

Indiana.

Chandler v. Pittsburg Plate Glass Co., 20 Ind. App. 165, 50 N. E. 400 (1898). Where an owner of land executes a gas lease and afterwards conveys the land, the grantee is entitled to the rents accruing after the conveyance. The grantor claimed these rents on the ground that the lease was a sale of the gas, which did not create the relation of landlord and tenant.

Comstock, J.: "The Supreme Court of this State holds that natural gas reduced to possession is personal property, but that the title does not vest in a private owner without it is reduced to actual possession. There can be no absolute, permanent property in natural gas until reduced to possession and placed under control. It is held to be a mineral, but of a peculiar kind. The title to it is likened to that in wild animals or fowls, 'in their fugitive and wandering existence,' or in fish passing up and down a stream. See *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627, and authorities there cited. To construe the lease in question as a sale of the natural gas would be entirely inconsistent with the doctrine laid down in the case last cited.

"The contract in question was for the use of land for the purpose therein named, and the right to the compensation agreed to be paid for its use accruing after the conveyance of the land was in the grantee."

Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768 (1900). "Natural gas is a fluid mineral substance, subterraneous in its origin and location, possessing in a restricted degree the properties of underground waters, and resembling water

in some of its habits. Unlike water, it is not generally distributed, and, so far as now understood, it cannot be used for but few purposes, the most important being that of fuel. Its physical occurrence is in limited quantities only, within circumscribed areas of greater or less extent. If it could be dealt with as subterranean waters, there would be little difficulty in determining the rules by which the rights of landowners and other persons interested in it should be governed. But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which the courts apply to questions relating to the latter are not adapted to the adjustment of the difficulties arising from conflicting interests in this new and peculiar fluid. Natural gas, being confined within limited territorial areas, and being accessible only by means of wells or openings upon the lands underneath which it exists, is not the subject of public rights in the same sense or to the same extent as animals *ferae naturae* and the like are said to be. Without the consent of the owner of the land, the public cannot appropriate it, use it, or enjoy any benefit whatever from it. This power of the owner of the land to exclude the public from its use and enjoyment plainly distinguishes it from all other things with which it has been compared, in the use, enjoyment, and control of which the public has the right to participate, and tends to impress upon it, even when in the ground in its natural state, at least, in a qualified degree, one of the characteristics or attributes of private property. In the case of animals *ferae naturae*, fish, and the like, this public interest is said to be represented by the sovereign or state. So in the case of navigable rivers and public highways, the state, in behalf of the public, has the right to protect them from injury, misuse or destruction. But in the case of natural gas there are reasons why the right to protect it from entire destruction while in the ground should be exercised by the owners of the land who are interested in the common reservoir. From the necessity of the case, this right ought to reside somewhere, and we are of the opinion that it is held, and may be exercised, by the owners of the land, as well as by the state. Natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands, that while each of them has the right to bore or mine for it on his own land, and to use such portion of it as, when left to the natural laws of flowage, may arise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners, to induce an unnatural flow into or through his own wells, or to do any act in reference to the common reservoir, and the body of gas therein, injurious to, or calculated to destroy it. In the case of lakes or flowing streams, it cannot be said that any particular part or quantity or proportion of the water in them belongs to any particular land or riparian owner, each having an equal right to take what reasonable quantity he will for his own use. But the limitation is upon the manner of taking. So, in the case of natural gas, the manner of taking must be reasonable, and not injurious to or destructive of the common source from which the gas is drawn. The right of each

owner to take the gas from the common reservoir is recognized by the law, but this right is rendered valueless if one well owner may so exercise his right as to destroy the reservoir, or to change its condition in such manner that the gas will no longer exist."

"The surface proprietors have the right to reduce to possession the gas found beneath. They could not be absolutely deprived of this right, without a taking of private property. But there is a coequal right in all of such owners to take the gas from the common source of supply. The use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of others. From these considerations, the supreme court of the United States held the legislature derived the power to protect all the collective owners, by securing a joint distribution, to arise from the enjoyment by them of their privilege to reduce to possession. It declares the act of 1893 to be a statute protecting private property, and preventing it from being taken by one of the common owners without regard to the enjoyment of others. A right of property in all the surface owners in the gas contained in the common reservoir of supply is recognized, as is also the constitutional legislative authority to protect the right of property from destruction. The final conclusion of the court is that one common owner of the gas in the common reservoir cannot divest all the others of their rights without wrongdoing. The acts of 1891 and 1893 are an express recognition by the legislature of the qualified ownership of the common owners in the gas in the common reservoir, and any act therein forbidden may be, according to the circumstances, the subject of a suit at law or a proceeding in equity by the person injured, as well as the foundation of a public prosecution. Independently, however, of any statute, for the reason already stated, the common owners of the gas in the common reservoir, separately or together, have the right to enjoin any and all acts of another owner which will materially injure, or which will involve the destruction of, the property in the common fund, or supply of gas. * * *

There is something in the nature of unity in their possession of the gas in the reservoir. 2 Bl. Comm. 182. It is charged in the complaint that the appellee is using in two wells owned by it, and threatens to use in others, pumping machinery and other devices by which the natural flow of gas is greatly increased, and that the effect of the use of such machinery and devices is to remove the back pressure by which the gas is confined in the Trenton rock, and a vast body of salt water, lying underneath and surrounding the reservoir, is prevented from rushing into the reservoir and destroying it, and putting an entire stop to the flow of natural gas therein. Certainly such acts are destructive of the common interests in the gas and reservoir, and the threatened injury is a proper subject of relief by injunction."

Heller v. Dailey, 28 Ind. App. 555, 63 N. E. 490 (1902). Because of the fluidity and fugitiveness of petroleum and natural gas, the absolute ownership of these minerals in the land cannot be acquired without reducing them

to actual control. "A grant of all the oil and gas in and under a tract of land is not a grant of any particular specific substance as would be a grant of the coal in and under certain land. The owner of the land is not, by virtue of his proprietorship thereof, the absolute owner of the oil and gas in and under it in its free and natural state, not yet reduced to actual control of any person, but he, together with the other owners of the land in the gas field, has a qualified ownership, consisting of or amounting to his exclusive right to do what may be done on, through, or under his land (as the making of wells) necessary to reduce the minerals to possession, and by thus acquiring the exclusive control, to become the owner of the mineral substances as his personal property, observing due regard in his operations to the like enjoyment of such exclusive right by all other landowners in like circumstances." See this case also on page 94 below.

Richmond Natural Gas Co. v. Enterprise Natural Gas Co., 31 Ind. App. 222, 66 N. E. 782 (1903). The Act of March 4, 1891 (Burn's Rev. St. 1901, §§ 7507-9), providing that natural gas shall not be transported through pipes at a pressure exceeding 300 pounds per square inch, nor otherwise than by the natural pressure of the gas flowing from the wells, etc., does not absolutely prohibit the use of pumps for the purpose of transportation. The right to transport by artificial means exists, provided a pressure of 300 pounds per square inch is not exceeded, and it is immaterial that a person is injured because of the wasteful diminution of the gas by the use of the pumps; the act does not directly or indirectly attempt to prevent the waste of gas. However, injunction will lie to prevent the use of devices for pumping and employing artificial processes or appliances for the purpose of having the effect of increasing the natural flow of gas from the wells. The statute does not create any new remedy in favor of an owner in common of undeveloped gas, who shows that he will sustain some special injury by reason of the act of another of the common owners which might work to the injury or destruction of the common source from which the gas is drawn. An action would lie in such case independently of the statute.

The term "natural flow," as used in the statute, means the entire volume of gas that will issue from the mouth of a well when retarded only by the atmospheric pressure. Increasing this natural flow of gas or this total output of the wells from natural causes is the thing that is prohibited, and if appliances such as pumps are added to divert some of this flow to consumers, the natural flow is not thereby increased. All the gas that goes into the pumps on the intake side goes by reason of its own expansive force or tension, which must necessarily exist so long as back pressure is maintained at the pumps. Unless the pumps were so operated as to entirely remove this back pressure and create suction in the wells, it could not be said that they would increase the natural flow or natural output of the wells. The statute does not require that only a certain portion of the gas coming naturally from a well can be used, and that a certain portion shall be held back, nor that a certain amount of back pressure, or that any back pressure, shall be maintained.

Andrews v. Andrews, 31 Ind. App. 189, 67 N. E. 461 (1903). "While a landowner has certain property rights in gas and oil in the ground, because

while in the particular ground they are a part of the realty, yet he cannot be said to be the absolute owner until he has reduced them to possession. His property in them is lost if they escape and go into another's land, and they may become the property of another landowner by being reduced to possession by him through a well drilled on his own land."

Richmond Natural Gas Co. v. Davenport, 37 Ind. App. 25, 76 N. E. 525 (1905). The natural gas or petroleum which may be under the surface and not reduced to the actual possession of any person constitutes a part of the land and belongs to the owner thereof in such a sense that he has the exclusive right by operations upon his land to reduce such mineral substance to possession and use and enjoyment, and to grant the privilege of doing so to other persons, although until so reduced to possession the mineral substance is subject to be taken by any other person by proper operations upon his own land; and a person in possession who has such exclusive right in the particular land as owner, lessee or grantee, with the privilege of extracting such minerals, may by injunction prevent operations for such purpose by others who have not rightfully acquired the privilege from the owner in fee. The taking of these minerals by a stranger, without right, constitutes a trespass. The taking by one lawfully in possession of the surface, without right, as a tenant for years or for life, constitutes waste. See this case also on page 6.

New American Oil & Min. Co. v. Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739 (1906). "The peculiar wandering character of gas and oil precludes ownership in their natural state, and hence they are not the subjects of sale and conveyance until they have been reduced to possession and placed under control by being diverted from their natural paths into artificial receptacles." See this case also on page 82.

Kansas.

Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995, 1 A & E. Ann. Cas. 403 (1904). Petroleum and gas are minerals. So long as they remain in the ground they are part of the realty. They belong to the owner of the land, and are a part of it so long as they are on it, or subject to his control. When they escape and go into other lands, or come under another's control, the title of the former owner is gone.

Kentucky.

Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S. W. 368, 25 Ky. Law Rep. 1221, 111 Am. St. Rep. 225, 70 L. R. A. 558, 4 A. & E. Ann. Cas. 355 (1903). The defendant desired to injure the plaintiff's gas field, and was accomplishing that purpose by maintaining on neighboring land a lampblack factory which wasted large quantities of gas without producing a substantial quantity of lampblack. It was enjoined from running the factory.

"While natural gas is not subject to absolute ownership, the owner of the soil must, in dealing with it, use his own property with due regard to

the rights of his neighbor. He cannot be allowed deliberately to waste the supply for the purpose of injuring his neighbor. While a bad motive will not render that unlawful which is lawful (*Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165), a man is only allowed to make a reasonable use of those natural supplies which are for the common benefit of all. The gas under the ground may go wherever it will, but" an operator cannot deliberately draw off the gas and waste it simply to interfere with the supply of an adjoining operator. "Every owner may bore for gas on his own ground, and may make a reasonable use of it; but he may not wantonly injure or destroy the reservoir common to him and his neighbor," and if he attempts to do so he may be enjoined by the owner of the adjoining oil fields.

Louisville Gas Co. v. Kentucky Heating Co., 33 Ky. Law Rep. 912, 111 S. W. 374 (1908). An injunction having issued in the case above between the same parties, this was an action at law brought for damages resulting from the alleged waste of gas from the common oil field.

"The right of the surface owners to take gas from the subjacent fields or reservoirs is a right in common. There is no property in the gas until it is taken; before it is taken it is fugitive in its nature, and belongs in common, to the owners of the surface. The right of the owners to take it is without stint, the only limitation being that it must be for a lawful purpose and in a reasonable manner. Such tenant in common is restricted to a reasonable use of this right, and each is entitled to the natural flow of the gas from the subjacent fields, and any unlawful exercise of the right by any tenant in common which results in injury to the natural right of any other tenant or surface owner is an actionable wrong. The damage sustained is only that which results from an improper interference with the natural flow of the gas in the wells and pipes of another. It is not the value of the gas at the point of distribution, or at any point where it enters artificial conduits, but the value in money for the diminution of the natural flow of the gas in the wells, directly and independently of all other causes attributable to the wrongs complained of. In other words, the measure of damages is the difference in money at the point where taken, between the value of the natural flow and that of the diminished flow, directly and independently of all other causes attributable to the wrong." Punitive damages are recoverable only when it is shown that the waste was malicious and with direct intent to injure defendant in its business.

Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, 33 Ky. Law Rep. 98, 109 S. W. 328 (1908). "One who illegitimately wastes or destroys the gas of a district may be punished under the criminal statutes of the State, and may also be enjoined from committing such wrongful acts. But all parties owning gas wells in the district are free to make any legitimate use of the gas they choose; and the fact that this legitimate use tends to exhaust the supply gives the other owners of gas wells in the district no just ground of complaint."

New York.

Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 N. E. 504 (1909), modifying 60 Misc. 341, 113 N. Y. Supp. 458 (1908). Under the common law, where the owner of land by pumping so increases the flow of percolating mineral waters and gas upon his land that he obtains a greatly increased proportion of the common supply at the expense of his neighbors, and does this for the purpose of supplying a public market with gas and turning the water to waste, a bill for an injunction will lie, but where he by pumps or otherwise draws off the water and gas for purposes naturally and legitimately connected with his own property, even though it interferes with others, he is within his rights.

Chapter 429, page 1221 of the laws of 1908, which is an act for the protection of the natural mineral springs of the state, and to prevent waste and impairment of its natural mineral waters, so far as it absolutely prohibits by pumping or other artificial contrivance the acceleration of the natural flow of mineral waters from any well drilled into the rock, and so far as it prohibits the acceleration, when its effect will be to impair the natural flow into the lands of other persons, is unconstitutional. It is an unlawful interference with property rights and forbids the performance of acts which a landowner has the right under certain limitations to perform. So far, however, as the act prohibits such acceleration of the flow of natural mineral waters, where the object is to extract and collect the carbonic acid gas for sale, the act is constitutional. "The landowner has no vested right unnaturally and unreasonably to force the flow of percolating waters for the purpose of marketing them, or for any purpose not connected with the use or enjoyment of his land." This being so, the legislature may enact such a statute to prevent waste, impairment and injury to others, not only in the present but in the future.

The distinction between wells bored through rock and other wells is based on a valid distinction, and is not a denial of the equal protection of the laws.

Ohio.

Kelley v. Ohio Oil Co., 57 Ohio, 317, 49 N. E. 399, (3 Am. St. Rep. 721, 39 L. R. A. 765 (1897)). The owner of land will not be enjoined from drilling oil wells on his own land, however near they may be to his neighbor's land, on the ground that he will thereby draw the oil from adjoining property.

Burket, C. J.: "Whatever gets into the well belongs to the owner of the well, no matter where it came from. In such cases the well and its contents belong to the owner or the lessee of the land and no one can tell to a certainty from whence the oil, gas or water which enters the well came, and no legal right as to the same can be established or enforced by an adjoining landowner."

"Petroleum oil is a mineral, and while in the earth it is part of the realty and should it move from place to place by percolation or otherwise,

it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract, and it forms part of some tract, until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. And this is so whether the oil moves, percolates or exists in pools or deposits.. In either event, it is property of and belongs to the person who reaches it by means of a well, and severs it from the realty and converts it into personalty."

Northwestern Ohio Natural Gas Co. v. Ullery, 68 Ohio, 259, 67 N. E. 494 (1903). Where an oil and gas lease is made by one party to another covering two or more separate tracts of land, and is made to extend to his heirs and assigns, and different persons become the owners of such different tracts of land, each owner is entitled to the oil and gas produced on his tract, and to the royalty and rental arising from such tract.

"Oil in the rock adheres to the real estate, and is a part thereof until brought to the surface, when it becomes personalty, just as a tree, or stone, coal, or fire clay is a part of the realty until severed, when it becomes personalty. That which is a part of the land before severance belongs to the owner of the land after severance as well as before. The fact that oil and gas are vagrant and transitory in their nature does not prevent them from adhering to and becoming part of the land while passing from one tract to another, and while so in one tract they are a part of that tract, and belong to the owner thereof until they escape from such tract, and, if brought to the surface before such escape, they become personal property belonging to the owner of the land. It therefore irresistibly follows that the oil or gas taken from a well on a particular tract of land belongs to the owner of that tract, even though the contract under which the well was drilled included other tracts of land. Because the contract of production may have included two or more tracts of land, such contract cannot have the force of taking from the owner of one tract the oil or gas adhering to such tract for the time being, and bestowing it upon the owner of another tract, where it may never have been. As oil and gas are migratory in character, no one can tell from whence they came, or whither they are going; and they must, therefore, belong to him upon whose lands they are captured. No one else can have any ownership in them, and a man can be awarded only that which he owns."

Pennsylvania.

Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074, 48 L. R. A. 748 (1900). Plaintiff and defendant were operating oil wells on adjoining farms. Defendant by use of a gas pump increased the product of his well and decreased the product of plaintiff's well. The gas pump is in use in most oil fields, but not generally except in failing territory. Its use by one operator necessitates its use by others in the neighborhood. If all use it the effect is neutralized. Its use by defendant was held not to be unlawful and an injunction was refused. Frazer, J., after quoting *Brown v. Vandergrift*,

80 Pa. 142, and *Westmoreland Natural Gas Co. v. DeWitt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731, says: "From these cases we conclude that the property of the owner of lands in oil and gas is not absolute until it is actually within his grasp and brought to the surface. If possession of the land is not necessarily possession of the oil and gas, is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make the production of his wells as large as possible?"

Kelly v. Keys, 213 Pa. 295, 62 Atl. 911, 110 Am. St. Rep. 547 (1906). A grant of the exclusive right to mine and produce petroleum and natural gas creates an incorporeal hereditament, and ejectment will not lie for it. The grantee is only entitled to such oil as he severs from the soil, and that not as any part of the real estate but as a chattel. "The reason for the rule thus established is to be found in the peculiar character of mineral oil. This is very clearly indicated in the earlier cases, where the distinction is drawn between minerals which are fugacious in their nature, such as water, gas and oil, and those which have a fixed situs and are necessarily part of the land; and this distinction has been allowed with controlling significance whenever oil in situ has been the subject of the dispute. Both rule and reason are against the theory that prevailed with the court below, to the effect that the mineral once discovered, all that was in situ became in law part of the real estate." See this case also on page 99 below.

Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801 (1907). It is the right of every landowner to drill wells on his own land wherever he may see fit. He may drill a well close to the line of the adjoining owner and draw from the land of the latter three-fourths of the gas produced by the well, and by so doing he is not invading any of the property rights of the adjoining owner so as to be legally accountable therefor. All that the neighbor can do is to go and do likewise. A lessee has the same rights as against the adjoining owner as his lessor, the landowner. But where the lessee is also the lessee of the adjoining land, his right to locate wells where he pleases must not be exercised fraudulently. See this case also on page 126.

Tennessee.

Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249 (1897). Petroleum and natural gas are minerals, within the meaning of a reservation in a conveyance of land, of "all mines, minerals, and metals in and under the land."

West Virginia.

South Penn Oil Co. v. McIntire, 44 W. Va. 296, 28 S. E. 922 (1898). "Petroleum oil, as it is found in the crevices of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land.' The only manner in which a guardian can lease or sell the land of his ward for the purpose of its development, or any other pu"

pose, is, in the manner prescribed by statute, under a decree of the court. A guardian has ordinarily power to lease any of his ward's property of such a character as makes it the subject of a lease; but without approval of the orphan's court, he cannot dispose of any part of the realty. Oil is a mineral, and being a mineral, is part of the realty; and a guardian cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of a part of the corpus of the estate of his ward." Followed in *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533 (1903).

Carter v. Tyler County Ct., 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725 (1899). Where an oil lease provides that the lessee shall put down the wells and bring the oil to the surface, and, when thus produced, the lessor is to have one-eighth as rent or royalty, the lessee cannot be taxed on the prospective product of the wells. "While the oil remains in the cavities of the rocks in situ * * * it is part of the realty. The lessee may drill the well to the sand or rock in which the oil is contained; but the oil does not change its character from realty to personalty, or any portion of its ownership, until it is brought to the surface, and then seven-eighths of it becomes the property of the lessee. * * * While he [the lessee] was the owner of the wells that had been drilled in the rocks, they were merely the conduit through which the oil might be drawn to the surface, and he had the privilege of pumping it to the surface; but the oil in its place among the rocks was not his, and might possibly never be * * * and he could not be assessed on property that he had not yet acquired, and it would be too speculative to assess him on property that he might thereafter acquire by future exertion. * * * We are not * * * required to pass on the question as to what party should be assessed with the oil in situ in this case, but do hold that it is not assessable as personalty."

Lawson v. Kirchner, 50 W. Va. 344, 40 S. E. 344 (1901). A lease for oil and gas purposes is a conveyance or sale of an interest in land, conditional and contingent on the discovery and reduction to possession of the oil or gas. "While it is a sale of real estate, so far as the lessors are concerned, it is only of such part thereof as the lessee may be able to find and convert into personalty. But it is such a sale as only the court can make, and the guardian cannot make except under the direction and authority of the court."

Preston v. White, 57 W. Va. 278, 50 S. E. 236 (1905). See this case on page 66 below.

CHAPTER II.

PROPERTY AND RIGHTS IN MINERALS WHERE THE TITLE TO THE MINERALS OR THE RIGHT TO TAKE THEM IS VESTED IN SOME ONE WHO IS NOT THE OWNER OF THE SOIL.

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| I. Estate in Fee Simple in Minerals in Place. | A. Leases of Lands with the Privilege of Digging and Boring for Oil or Gas. |
| II. Lease of Minerals or of Land with Mining Rights. | B. Incorporeal Rights and Licenses Relating to the Extraction of Oil and Gas. |
| III. Incorporeal Rights to Minerals. | |
| IV. Licenses to Mine. | |
| V. Oil and Gas Leases. | VI. Reservations and Exceptions. |

I. ESTATE IN FEE SIMPLE IN MINERALS IN PLACE.

p. 36. As time passes the doctrine of *Caldwell v. Fulton* (vol. 1, p. 44) becomes more firmly intrenched. Land is capable of an imaginary division for the purposes of ownership laterally as well as vertically. Minerals in place being land may be conveyed as such apart from the surface. Any instrument, by whatever words, the intent of which is to confer the right of unlimited mining of all the named minerals in described land, exclusive of the grantor, meets the test. This doctrine has been consistently adhered to in establishing the distinction between conveyances of corporeal rights and incorporeal hereditaments.

The courts of Pennsylvania, in a line of cases beginning with *Hope's Appeal* (vol. 1, p. 46), went to what many have thought an unwarranted length, in holding that if the conveyance met the above test it was none the less a sale of the minerals in place because a term of years was prescribed within which they must be taken out. The supreme court of that state, without impeaching the authority of those cases, has recently said that "the expression that a conveyance of coal in place, even by a lease for

a limited term is a sale, is inaccurate as a general proposition of law and unfortunate from its tendency to mislead." The cases referred may be now considered authority only for what they actually decide, and conveyances of minerals for limited terms should be classified as leases without impeachment of waste.

The court, however, in *Denniston v. Haddock*, stated that the point to be noted was that the rules applicable to sales were not to be applied indiscriminately to such instruments, but that each was to be construed like any other contract by its own terms. On the authority of this proposition the same court in two subsequent cases in which there was an express conveyance of all the coal under the land, and no term prescribed in limitation of the estate, has decided that the lessor still had an interest in the coal which he might subject to the lien of a judgment or mortgage. In both cases there was an agreement to pay a minimum annual royalty, and a provision that the deficiency might be made up in subsequent years, and it was held that the purchaser of the lessor's title at sheriff's sale acquired the right to receive the royalty under the lease. It seems clear that this could not be the case if the royalty were purchase money and consequently personalty, and that these cases are not to be reconciled with the principle, which is the logical deduction from *Caldwell v. Fulton*, and is laid down in *Fairchild v. Fairchild*, 9 Atl. 255; *Lazarus' Estate*, 145 Pa. 1, 23 Atl. 372, and *McFadden's Estate*, 224 Pa. 443, 73 Atl. 927.

There has been no inclination shown by other courts to follow the doctrine of *Genet v. D. & H. Canal Co.* (vol. 1, p. 42), however reasonable that doctrine may be. Indeed the tendency is in the other direction (*Smoot v. Consolidated Coal Co.*, 114 Ill. App. 512; *Dorr v. Reynolds*, 26 Pa. Super. Ct. 139).

A deed or other written conveyance is not essential to accomplish the severance of the mineral estate. Land being capable of horizontal division, that division may be accomplished by acts the same as or analogous to those by which vertical division may be accomplished (*D. and H. Canal Co. v. Hughes*, see p. 41 below; *Byers v. Byers*, see p. 18 above).

Where there has been a separation in ownership of the minerals from the ownership of the soil, the owner of the minerals is also the owner of the space occupied by them, even after they have been removed, and has the same rights of use and enjoyment of

this space as have other owners of real estate. When, however, his rights have terminated by exhaustion of the minerals, the ownership of the space occupied by them likewise comes to an end, and it reverts to the owner of the soil.

United States.

Plummer v. Hillside Coal & Iron Co., 43 C. C. A. 490, 104 Fed. 208 (1900) 3rd Circ. Land was leased for a period of 100 years, for a certain present consideration and an annual rental of \$1, the possession which the lessee acquired under the lease to "extend only to the use of the leased premises as a coal field, that is to say, the said Thomas [lessee] shall have full right, power and possession to search for coal anywhere on the leased premises *

* * * to raise the coal * * * at all times to enter and carry away the coal * * * and to sell the same for his own benefit and profit." It was also agreed that the lessor and his heirs so long as they resided on the premises should have the right to dig whatever coal they might want for their own use, but not to sell so as to interfere with the works of the lessee. Held that "the lease contains words of present demise. It is not executory * * * It operated not only to work a severance of the surface of the land from the underlying coal, but as a sale of coal with the right of removal within one hundred years. After such severance the continued occupation of the surface of the land by Callender [the lessor] and those claiming under him did not create title in them to the coal by adverse possession under the statute of limitations."

This was the same instrument as that under consideration in *Kingsley v. Hillside Coal & Iron Co.*, 144 Pa. 613, 23 Atl. 250 (vol. 1, p. 47), and *Plummer v. Hillside Coal & Iron Co.*, 160 Pa. 483, 28 Atl. 853 (vol. 1, p. 48).

Butler v. McGorrick, 52 C. C. A. 212, 114 Fed. 300 (1902). 8th Circ. A deed conveyed "all the coal and the right to mine and remove the same" under certain land, and declared that the grantee "is to mine and remove said coal by May 1, 1891, and no coal is to be mined after that date. By accepting this conveyance, the grantee agrees to mine and remove said coal by May 1, 1891". Held that the deed conveyed to the grantee as much coal as he saw fit to remove before May 1, 1891, and the right to the coal terminated on that date, for thereafter the grantee could not mine or remove it. "The right to mine and remove the coal is the very substance of this contract. A limitation upon that right is necessarily a limitation upon the coal conveyed, for the coal conveyed is of no use or utility to the purchaser without the right to mine and remove, and there can be no implied right to mine and remove the coal where the right is express and the limitation is expressly put upon the right."

Alabama.

Brooks v. Cook, 141 Ala. 499, 38 So. 641 (1904). A lease of mineral rights and privileges on certain lands for a term of ten years for a consideration of \$1 and a royalty on all ore mined, based on the assumption that certain

ore exists, is nothing more or less than a sale by them of the ore which both parties supposed to exist, and, if the evidence shows that said ore did not exist, then the obligation of the lessees to mine was at an end, as was likewise their obligation to pay royalty.

"Whether you denominate it a lease or by any other name, when a man acquires the right to take ore out of the land, he takes away a part of the substance of the real estate itself, and whether the consideration be called 'royalty' or by any other name, it is paid for the purchase of the substance which is taken away. Consequently such a contract is a conveyance of a part of the real estate, and must be executed with the formalities required for conveyances of real estate."

Gulf Coal & Coke Co. v. Alabama Coal & Coke Co., 145 Ala. 228, 40 So. 397, 7 L. R. A. (N. S.) 712 (1906). Section 809 et seq. of the Code of 1896 says, "When any person is in peaceable possession of lands, whether actual or constructive, claiming to own the same and his title thereto or to any part thereof is denied or disputed, such person so in possession may bring and maintain a suit in equity to settle the title to such land and to clear up all doubts and disputes concerning the same." "It is admitted that the coal and other mineral are a part of the land, but the contention seems to proceed upon the theory that, because this interest does not comprise the whole of the land, therefore it is not land within the meaning of the word 'lands' employed in the statute. We think this a too narrow and technical construction. The statute is a remedial one and should be liberally construed. Whenever a person acquires such an interest in land as is capable of being possessed peaceably, and it is so possessed, we are of the opinion that the statute affords the owner of such an interest a remedy to have its title quieted."

Colorado.

Bogart v. Amanda Consol. Gold Min. Co., 32 Colo. 32, 74 Pac. 882 (1903). "Unquestionably in mineral land there may be a severance of estates; the mineral constituting a separate corporeal hereditament, capable of distinct conveyance from the surface or the soil, each estate being in separate owners. But it is also true that, until there has been a severance, ownership of the surface carries with it ownership of the minerals beneath the surface."

Georgia.

Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 606 (1905). See this case under chap. XXI, below.

Illinois.

Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N. E. 144 (1898). "The conclusion seems to be inevitable that coal and minerals in place where the

title thereto has been severed from the title to the surface, constitute land as fully as does the surface, and as such are subject to all the laws of possession and conveyance of real estate, and the owner thereof has all of the rights of an owner in land, and may invoke every legal right to assert and defend his title that is provided for owners of title in fee to the surface, and no reason is perceived why he should be denied the beneficial operation of our statute of limitations."

Smoot v. Consolidated Coal Co., 114 Ill. App. 512 (1904). "The conveyance of coal in place, beneath the surface, operates to create a distinct and separate estate in the grantee, entirely independent of the estate and rights of the owner of the surface. * * * So the owner of the entire estate in a tract of land containing several distinct and separate minerals may, by apt conveyances, vest in each of several grantees distinct and separate estates in the tract."

Where a deed grants "all the coal in and under" a certain described tract of land, with the right to mine and remove the same, such deed creates in the grantee an estate in the coal only, as a distinct and separate entity, in the tract of land described, and by necessary implication reserves to the grantor the title and right to all and every other estate therein. The fact that iron pyrites are found in the vein of coal, more or less intermingled with the coal, and necessarily removed from their place of deposit in the operation of mining the coal, does not pass title to the iron pyrites to the grantee as an appurtenance of the coal. Each of the two minerals being, in legal contemplation, land, neither would pass by grant of one, as appurtenant to the other, unless particularly designated. In such case, therefore, the grantor can recover damages for all iron pyrites mined and converted by the grantee, but, since the removal of the iron pyrites is not attributable to negligence or inadvertence, but is necessitated by the removal of the coal to which the grantee had a right, the measure of damages is the value of the property at the time of the conversion, that is, the value of the mineral at the mouth of the pit less the cost of digging it and of carrying it to the mouth of the pit and of separating it from the merchantable coal.

Brand v. Consolidated Coal Co., 219 Ill. 543, 76 N. E. 849 (1906). Coal in place underlying land and constituting a substratum of the real estate is itself real estate, which may be severed from the surface, and the title thereto may be in one person, while the title to the surface is in another. Such an estate in underlying coal when held by tenants in common may be the subject of partition.

Kansas.

Cherokee & Pittsburg Coal & Min. Co. v. Board of Com'rs of Crawford County, 71 Kan. 276, 80 Pac. 601 (1905). Minerals in the earth are real estate, and, when the owner of them has not the fee to the surface of such land, they should be separately assessed and taxed.

Ohio.

Moore v. Indian Camp Coal Co., 75 Ohio, 493, 80 N. E. 6 (1907). "There may be a complete severance of the ownership of the surface of land from the ownership of the different strata of mineral which may underlie the surface; and the creation of a separate interest in the mineral with the right to remove the same, whether by deed, grant, lease, reservation or exception, unless expressly restricted, confers upon the owner of the mineral a fee simple estate, which is of course determinable upon the exhaustion of the mine. * * The grant of such an estate in the mineral, in whatever form, necessarily implies the right to use or remove such portions of the containing strata as may be necessary or proper for the convenient and proper removal of the mineral itself, having regard at the same time to the right of the surface owner to subjacent support."

"The mine owner has the right to use as he may choose, but without injury to the owner of the soil, the space left by excavation of the mineral so long as it remains a mine; that is to say, until the mineral shall be practically exhausted. It results from the absolute proprietorship over the mineral in place, that the owner thereof has a like interest in the containing chamber until the termination of the estate. * * * The empty space is not merely property which may be used as an incident to the removal of the mineral included in the grant; but he may use the space, created by removal of mineral within the grant, as a way for the carriage of minerals from his adjoining lands, or he may cut a passage through the minerals and use it for the carriage of minerals from his other lands."

Hutson Coal Co. v. Hughes, 29 Ohio Circ. Ct. R. 139 (1906). D. by written agreement bargained, sold and conveyed all the mineral and stone coal underlying a certain tract, and the grantees agreed within six months to test the land by drilling, and in case they found coal of the quantity and quality to warrant mining, to mine the same and pay a fixed royalty on all merchantable coal taken out. The agreement conferred upon the grantees the privilege of abandoning the property when the coal was exhausted. This was held not to be a lease but a sale, and after D's death his heirs could not sue for the royalty as rental. It was personal property and passed to his personal representatives.

Pennsylvania.

Maffet Estate, 9 Kulp, 136 (1897). See this case on page 8.

Finnegan v. Stineman, 5 Pa. Super. Ct. 124 (1897). "That minerals beneath the surface of a tract of land may be conveyed by deed, distinct from the right to the surface, is, of course, unquestioned. After severance of the surface from the underlying strata, whether by reservation or by express grant, the mineral right is an independent interest in land; it forms a distinct possession; is held upon a distinct title; and is as much the subject of sale, devise or inheritance and of separate taxation and incumbrance as the surface. The technical words 'grant, bargain and sell,'

or the like, are not necessary to the creation of a separate estate in the coal, provided the intention to sell the coal is manifest; and it is now too well settled to admit of argument, that an instrument which is in terms a demise of all the coal in, under and upon a tract of land, with the unqualified right to mine and remove the same, is a sale of the coal in place; and this, too, whether the purchase money stipulated for is a lump sum or is a certain price for every ton mined, and is called rent or royalty. *Sanderson v. Scranton*, 105 Pa. 469; *Delaware L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 1 Atl. 394, 58 Am. St. Rep. 743; *Montooth v. Gamble*, 123 Pa. 240, 16 Atl. 594; *Kingsley v. Hillside Coal & Iron Co.*, 144 Pa. 613, 23 Atl. 250; *Lazarus' Estate*, 145 Pa. 1, 23 Atl. 372; *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236; *Plummer v. Hillside Coal & Iron Co.*, 160 Pa. 483, 28 Atl. 853; *Lehigh & Wilkes-Barre Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919; *Hope's Appeal*, 29 Weekly Notes Cases, 365; *Fairchild v. Fairchild*, 7 Cent. Rep. 873. It was intimated in *R. R. Co. v. Sanderson* that there might possibly be a distinction between a perpetual lease, that is, one to continue until all the coal under the tract is mined, and a term lease, but this distinction has not been recognized in later cases. 'Where a fair interpretation of the written agreement shows that a sale was intended by the parties and a right to mine and remove all the coal is conferred by it in express terms, or by plain and necessary implication, it will constitute a sale, notwithstanding a term is created within which the coal is to be taken out.' *Kingsley v. C. & I. Co.*, *supra*."

Delaware & Hudson Canal Co. v. Hughes, 183 Pa. 66, 63 Am. St. Rep. 743, 38 L. R. A. 826 (1897). "If the owner grants to another the right or privilege of taking coal from his lands this grant, if not an exclusive one, is not the grant of an interest in land, but of an easement or incorporeal right which leaves the title to the coal in place remaining in the grantor. But a grant of all the coal, or of the exclusive right to mine the coal, is a sale of the coal in place.

"The conveyance of the coal creates in the vendee an interest in land. The deed or other conveyance is within the recording acts, and is subject to all the rules and regulations governing conveyances of the surface. It may convey an estate in fee simple in the coal or other mineral, or any lesser estate, in the same manner and by the same words of grant made use of in conveyances of the surface. When such a conveyance has been made of the coal or other mineral it works a severance of the estate so conveyed from the surface and if the deed be recorded it is constructive notice to all the world of the fact of severance. Thenceforward the owner of the soil may cultivate, inclose and reside upon his estate for any length of time, but his possession will not extend below it. It will not grasp or affect in the slightest degree the estate below him which has been severed by the deed. In like manner the owner of the mineral estate may enter upon and operate it while the owner of the surface is leaving his estate unoccupied and wild, but the possession of the lower estate will not reach upward and attach to the surface. Each estate may be occupied, conveyed,

incumbered, sold by the sheriff or allotted in partition without any effect upon the other." See this case also under chapter XVIII, below.

Hosack v. Crill, 18 Pa. Super. Ct. 90 (1901). H. by article of agreement granted, bargained and sold to W., his heirs and assigns, "all the mineral, coal and iron in, upon and under" a certain tract of land, with rights of ingress and egress, of exploring and removing ore, etc., and of occupying the surface with necessary buildings and refuse. W. agreed to search for coal and ore, and in case of finding them in such quantity and quality as to justify mining, to open and work mines and pay \$10 per annum after completion of a railroad by which they could be taken to market and also a royalty on coal mined and removed, failure to pay rental to be deemed an abandonment, and if the railroad was not built in 15 years, annual payments to be made, etc.

H. subsequently died and by his will devised the above tract of land to his daughter C. Held C. was not entitled to royalties; these passed as part of the residuary estate. The conveyance to W. was not a mere license or option but was a sale of the coal in place. A separate estate in the coal was created, which passed to W.; H. retained the surface only. This passed to C. under the will. The royalties were purchase money, which was distributable as personalty. Followed in *Hosack v. Crill*, 204 Pa. 97, 53 Atl. 640 (1902).

Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197 (1901). Mitchell, J.: "It has been said in a number of cases that a conveyance of the right to mine and remove all the coal in a given tract of land, is a sale of the coal in place although the conveyance may be called a lease. The expression is unfortunate, for while it may have produced no erroneous result in the cases where it is used, it tends to substitute the general rules appertaining to sales, for the rules properly applicable to the particular contract that may be under consideration by the court. Thus for example, in *Hope's Appeal*, 29 Weekly Notes Cases, 365, which is practically the starting place of the error, the agreement though called a lease was a purchase of the coal at a fixed price per acre, making a liquidated gross sum, which was payable absolutely in instalments ending within thirteen years, though the lessee had a nominal term of ninety-nine in which to remove the coal. It was justly said by the learned court below whose decision was affirmed here that it was 'manifest that the parties contemplated an actual sale of the coal, and not a lease in the ordinary use of that word.' In *Sanderson v. Scranton*, 105 Pa. 469, the lease was expressly made, 'perpetual until all the coal under the tract is mined,' and it was held that this was such a complete severance that the taxes of the city of Scranton on the coal in place were chargeable to the lessee and not the lessor. So in *Kingsley v. Hillside Coal & Iron Co.*, 144 Pa. 613, 23 Atl. 250, it was again held that there was such a severance that occupation of the surface was not an adverse possession even against a lessee who had not opened up or entered on actual possession of the coal.

"With the decisions in these cases no fault can be found, but the expression that a conveyance of coal in place, even by a lease for a limited term is a sale, is inaccurate as a general proposition of law, and unfortunate from

its tendency to mislead, which is apparent in some of the subsequent cases. Whether it would be better to call such an instrument accurately what it certainly was at common law, a lease without impeachment of waste, or to endeavor to reconcile all the decisions by calling it a conditional sale, is not necessary at present to discuss. The point to be noted is that the rules applicable to sales are not to be applied indiscriminately to such instruments but each is to be construed like any other contract by its own terms.

"The defense in the present case is an ingenious misapplication of the principle of a sale. Appellant in compliance with his obligation under the lease paid a minimum royalty each year, and at the end of his term had paid more royalty than would have been required by the coal actually mined. He remained in possession of the land for a year under arrangement with one of the owners, and then took a new lease, under which the royalties now sued for accrued. He now claims to defalk the overpayments under the old lease, on the ground that he had paid for the coal and was entitled to it without further charge, because under his continued possession he could take it away without a trespass. The defect of this view is in the assumption that he had paid for the coal. He had not. He had paid his rent on the stipulated terms, but he had paid nothing for the coal in place. His sole claim and title to that was to mine it during the term of the lease. As to it he was in the position of a lessee of a house bound to pay rent whether he occupied it or not. The fact that he paid without occupying it would not excuse his liability for further rent if he accepted a new lease.

"Appellant admits that if he had gone out of possession at the termination of his lease, he would have had no further claim to the coal, but his reason assigned is not the correct one. The right to remove the coal would have ended, not because the lessee had forfeited or abandoned his property in it but because he had never acquired any such property, his right to do so being expressly limited to the term covered by the lease.

"There is no analogy to the case of trade fixtures. Such fixtures start as the property of the tenant, and remain his until he forfeits them by failing to detach them from the realty while he is in possession. Here the coal never was appellant's and his only right to acquire it was limited to the term.

"Nor can the argument that time was not of the essence of the contract prevail. The principle invoked is not applicable. Time in a lease in respect to the length of the term is a limitation of the estate, and always of the essence of the conveyance."

Dorr v. Reynolds, 26 Pa. Super. Ct. 139 (1904). "It was said in *Hosack v. Crill*, 18 Pa. Super. Ct. 90, that: 'It is now well settled that an instrument which is in its terms a demise of all coal in, under and upon a tract of land, with the unqualified right to mine and remove the same, is a sale of the coal in place. And this, too, whether the purchase price is a lump sum or is a certain rent or royalty, and notwithstanding a term is specified in which the coal is to be taken out.' Numerous authorities are cited in

support of that declaration of law. The fact that the instrument is called a lease and the parties describe themselves as lessor and lessee and that payment for the coal is called rent does not change the legal effect of the deed."

"It cannot be doubted that the intention of the contracting parties in this case was there should be a sale of all the coal. It is so expressed in the deed and the provisions of the contract as to mining do not admit any other conclusions. The time within which the coal must be removed is not limited and the grantee is authorized to mine all the coal that is merchantable. He was bound, moreover, to pay for the quantity of coal stipulated to be mined whether it was mined or not.

"The provision for the right of surrender by the grantee in the event that coal could not be mined at an average cost not exceeding the average cost of mining in the mines of any one of the companies named in the contract or the liberty of forfeiture for nonperformance according to the terms of the contract does not change the character of the interest acquired by the grant. The estate is held subject to these conditions."

Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991 (1904). A deed contained this reservation: "And it is further covenanted and agreed that this deed does not convey any right, title or interest to the party of the second part in coal or coal lands situated beneath the said property, but that the said parties of the first part shall still hold possession of said coal banks with the right of mining the same, and the right of way to said coal banks, the same as if this deed had never been executed, the first part has no privilege of selling coal at the banks."

"This was a complete severance of the coal from the surface.. While at the date of this deed 1859, the power to separate land horizontally into two or more estates by deed was not generally recognized and acted upon by the profession, although the power had long been settled in England as well as the construction to be given to the instruments of severance, yet just about the date of this deed October, 1858, this court held in *Caldwell v. Fulton*, 31 Pa. 475: 'Coal and minerals in place are land. It is no longer to be doubted that they are subject to conveyance as such.' The tendency had been in many cases heretofore, to twist the right to the mineral into an incorporeal hereditament, a right issuing out of the land, instead of the land itself. In about a year afterwards, this case was followed by *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Rep. 436, in which was said: 'Mines are land and subject to the same laws of possession and conveyance.' This has been the settled law consistently followed by us since. When then, Huss took his deed from Leonard's heirs he took an absolute estate in fee simple in the land extending indefinitely downwards as well as upwards. When he made his deed to Long, by the reservation, he severed his estate horizontally, he did not convey the coal which he continued to hold under the Leonard deed, he did convey the surface to Long and that was his no longer; but the coal was his land thereafter just as much as the surface was Long's land. He could no more be divested of any right or title to this substratum of land than Long could be divested of his superstratum, the surface." Dean, J.

Coolbaugh v. Lehigh & Wilkes-Barre Coal Co., 213 Pa. 28, 62 Atl. 94, 4 L. R. A. (N. S.) 207 (1905). On August 30, 1870, Milton Dana and others, owners of coal lands in Luzerne county, entered into an agreement with the Wilkes-Barre Coal and Iron Company, granting, demising and leasing unto it, its successors and assigns, all the coal in said lands. The appellee succeeded to all the rights of the original lessee. The demise or lease, as the agreement is termed by the parties, was to date from January 1, 1870, and "to determine and end when all the mineable (and) anthracite coal shall have been mined and removed from the demised premises, unless the term be sooner ended under provisions" thereafter contained. The lessee covenanted to pay to the lessors the annual rental of \$20,000, in quarterly instalments of \$5,000 each, in consideration of which it is permitted annually to mine and remove 80,000 tons of coal. There is a further provision that, "if the said party of the second part shall pay said twenty thousand dollars rent in any one year, as is hereinbefore provided, and during that year less than eighty thousand tons of coal, of the pounds aforesaid, be mined and removed, the said party of the second part may, in any subsequent year within six years thereafter, during the continuance of this lease, mine and move sufficient coal to make up the deficiency." On default in the payment of "an installment of rent, or any part thereof," for a period of sixty days, it was covenanted and agreed that the lessors, in their option, might declare the term of the "lease" at an end, and the "lease" was thereupon to absolutely cease and determine. Dana received his share of the payments made for the coal to April 1, 1880. On April 3, 1880, the sheriff on execution against him sold all his "right, title and interest in and to all the coal in and under" the land embraced in the lease. It was held that by this sale there passed to the purchasers Dana's right to receive rentals or royalty under the lease. After quoting with approval *Denniston v. Haddock*, as above, the court said: "If the lessee had paid the rental of \$20,000 for the first year, but had mined no coal, and in the second year, on its default in payment of a quarter's rent, the lessors had, in accordance with the terms of the lease, declared it terminated, and resumed possession under the forfeiture clause, the lessee could not thereafter have mined and removed any coal because it had paid \$20,000 for the first year. This is the clear meaning and intent of the contract. That sum would have been retained simply as rent paid and received as such for the right to occupy and use the land by removing the coal therefrom for one year. *Lehigh & Wilkes-Barre Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919; *Lehigh Valley Coal Co. v. Everhart*, 206 Pa. 118, 55 Atl. 864. It is only 'during the continuance of the lease,' that is, before the rights of the lessee have terminated by a forfeiture of them, that it can, during any six years following an annual payment of \$20,000, appropriate to the payment of coal mined so much of that sum as has not been appropriated in any prior year to the payment of coal mined. After the expiration of six years no such appropriation can be made, and the minimum royalty is to be retained purely as rent for the year's occupancy of the land.

"The agreement of the parties is that the minimum rental of \$20,000 may be applied by the lessee on account of the purchase money of the coal, provided it will actually purchase and acquire title in the manner pointed out in the agreement, viz., by mining it within six years. Until it is so mined the legal title remains in the lessors, and if not taken from them within six years during the continuance of the lease in the manner stated, the money paid them belongs to them as rental for their land which had been occupied by the lessee, though not used and appropriated by it as it had the right to do. This was just the situation when the interest of Dana in the coal land was seized and sold under the execution against him. If the coal had all been mined, the worked-out space would have reverted to him, and what had not been worked out was under a continuing contingency of reverting to him by a forfeiture of the lease. He still had an interest in the coal as land, title to portions of which, and in the end to all of which, he had agreed should pass from him and become vested, not only equitably, but legally, in the lessee, as from time to time it acquired the legal title to the coal by mining and removing it. But until the legal title was so taken from him it remained in him, as in the case of any vendor of real estate. This is the title that was still in him when it was sold from him by the sheriff to Birbeck and Van Horn, and having acquired it, they are now entitled to all the rights under it. The one involved in this case is the right to the royalties, which, under the agreement of August 30, 1870, are to be regarded as pro tanto purchase-money payments for the coal in place, if mined and removed within a stipulated time. The title thereto is acquired by using these royalties within the stipulated period of six years during the continuance of the lease as payments for coal actually taken out and away.

"As the question raised on this appeal did not arise in any of the cases holding a lease like the present to be a sale of coal in place as land, they are not to be regarded as in conflict with the view here expressed. Though expressions in some of them are apparently irreconcilable with it, it is to be remembered, as is said in *Denniston v. Haddock*, 'the rules applicable to sales are not to be applied indiscriminately' to these leases; and when, as here, the question is as to the right of the grantor or lessor to subject the interest in the land which remains in him to the lien of a judgment or mortgage, no other doctrine than the one announced by the court below can accord with reason or the authorities relating to the interest retained by a vendor under an agreement for the sale of his land. The order of the court below discharging the rule for judgment is affirmed."

Gallagher v. Hicks, 216 Pa. 243, 65 Atl. 623 (1907). "There is no question at all that coal or other minerals may be severed from the surface of the land, and may run in its own different line of title without reference to the other. Nor is it disputed that a contract regarding coal in place may be a sale absolute, a conditional sale or a lease. There is nothing revolutionary in the cases referred to. In *Denniston v. Haddock* it was pointed out that in *Hope's Appeal*, 29 Weekly Notes Cases, 365, there was in fact a sale of the coal in place and the case was directly decided on that basis.

But an unfortunate expression in the opinion had been the starting point of a tendency to class together all contracts about coal in place as absolute sales without due regard to each particular contract and the obligation to interpret it by its own terms and intent. What *Denniston v. Haddock* and the cases which have followed it did was to check the tendency to indiscriminate lumping of all such contracts together and to recall in regard to them the true principles of construction applicable alike to all contracts."

Chambers leased to Hicks "all the coal known as the upper Freeport seam, lying or being in, upon or under "a certain tract of land "with the sole and exclusive right" of taking coal, etc., in consideration whereof Hicks agreed to pay Chambers, "the sum of six cents per ton for each and every ton of 2,240 pounds of coal mined or dug from the premises, during the continuance of this lease, which rent or royalty shall be paid monthly." It was further agreed that if sufficient coal was not mined to make the royalty \$50 per month, yet the second party was to pay the \$50 per month, and the payment over and above the royalty earned was to be considered as an advance payment for coal afterwards mined during the year. Hicks had the right to surrender the lease at any time on payment of all royalties due, and on the other hand Chambers could declare the lease forfeited if the royalty should remain unpaid for three months after it should be due.

So far as the lessor's interest is concerned, the lease is not substantially distinguishable from that in *Coolbaugh v. Coal Co.* He had a continuing interest in the land which was bound by a judgment against him, and under a sheriff's sale of the right, title and interest of the lessor, the right to royalties passed to the purchaser.

Turner v. Lehigh Valley Coal Co., 34 Pa. Super. Ct. 101 (1907). The owner of land "demised, leased and to mine let" "all the coal lying and being in, under and upon" the land "to have and to hold the said coal and surface and the estates, rights and privileges hereby devised, with the appurtenances, * * * until the merchantable coal upon the said premises available by proper, skillful and careful workings shall have been mined out and exhausted." The instrument provided that the lessee should pay a fixed annual sum and a royalty on coal mined in excess of a fixed amount and also that the lessor should be "furnished annually during the continuance of this lease with eighteen tons of prepared coal to be delivered at the chutes free of charge." No coal was mined, but the defendant, the assignee of the lessee, paid the minimum royalty. This suit was brought by the successor in title of the lessor to recover the value of prepared coal which was to have been furnished to the lessor.

"Whilst the paper before us is called by the parties a 'lease,' and contains many provisions properly applicable only to such an instrument, yet it contains others, and they going to its very substance, that proclaim the intention of the parties to have been a sale of all the coal in place and make this contract not distinguishable from those construed" in *Scranton v. Phillips*, 94 Pa. 15, and *Sanderson v. Scranton*, 105 Pa. 469.

"From this it would seem to follow logically that the consideration named in the contract, the thing of value moving from the grantee to the

grantor, was, legally speaking, purchase money. And this would be true not only of that portion of the consideration which was to be paid in money, but also to the eighteen tons of coal to 'be furnished annually during the continuance of this lease.' "

"In the recent case of *Coolbaugh v. Lehigh & Wilkes-Barre Coal Co.*, 213 Pa. 28, 62 Atl. 94, 4 L. R. A. (N. S.) 207, it was held, construing a contract substantially like the one now before us, that, as to the coal remaining unmined at any particular time, the lessor still retained the legal title so that it would be bound by the lien of a judgment against him; that by a judicial sale following an execution issued on such judgment such title would be divested, and thereafter the sheriff's vendee would have the right to receive the rent or royalties reserved in the lease. Of course, if the instrument now under consideration be regarded as a lease, pure and simple, and the consideration to be paid annually, under its terms, as rent, the transfer of the title to the demised premises would carry with it the right to the receipt of the rent thereafter accruing. It matters not, therefore, whether we regard the annual furnishing of eighteen tons of coal as part of the purchase money or part of the rent; in either case the present plaintiff, having succeeded to the ownership of the undivided one-third of the estate of the original grantors or lessors, has become lawfully invested with the right to receive that proportion of the annually accruing rent or purchase money."

Arnold v. Cramer, 41 Pa. Super. Ct. 8 (1909). By the terms of a lease the lessor "let" to the lessee all his undivided half interest in certain described land for the term of ninety-nine years and from year to year thereafter, in consideration of a royalty on all coal of certain grades, mined and sold from the land, the lessee covenanting to commence selling the coal within six months, and to mine and prepare it at his expense. The lease also provided that the lessee should have full control and entire management of the land, surface and coal during the continuance of the lease, and also that "This lease expires when coal is exhausted." It was held that this was a sale of the coal in place. It made no difference what words of conveyance were used, if from the language of the whole instrument the intention to sell is apparent. How this is to be reconciled with *Denniston v. Haddock*, above, page 42, it is difficult to see.

South Carolina.

National Light & Thorium Co. v. Alexander, 80 S. C. 10, 61 S. E. 214 (1907). A. agreed to sell to B. by good and sufficient deed the mineral and mining rights of his land, which B. agreed to buy. Pending execution and delivery of the deed A. agreed to permit B. to take and remove the minerals from his land, with the right to mine the same "and such privileges as are usually granted in connection with such mining," but in the event of A. being unable to convey a good title, etc., then he agreed to lease the mining rights to B. for ten years at a fixed royalty, B. agreeing in such event to take such a lease, this agreement to be binding on the heirs.

executors, assigns, etc., of the parties. Held the language of the agreement is inconsistent with a revocable license and shows that if the executory agreement is carried into effect by the execution of a deed, it will confer upon the grantee an interest in the land itself which can be assigned.

Tennessee.

Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249 (1897). "In mineral lands, the surface, as adapted to cultivation, may be separated from the right to dig under its surface for ore and one person may hold one of these rights, while another holds the right of the other." The possession of the surface therefore is not adverse possession of the minerals under the statute of limitations.

McBurney v. Glenmary Coal & Coke Co., 118 S. W. 694 (1909). "While it is true that coal, minerals, etc., may be by deed severed and separated from the rest of the land and become subject to the laws of devise, descent and conveyance, as in their nature they are inseparably mixed and connected with the balance of the land, a conveyance of the minerals in a tract of land does not in the technical sense of the word create a separate and distinct estate; but it separates a part of the property from the balance, and the right of ownership and control of coal and other minerals may be, and usually is, in entire harmony and consistent with all other rights of ownership to the surface and any other parts of the land."

Utah.

Smith v. Jones, 21 Utah, 270, 60 Pac. 1104 (1900). The surface of mineral lands may be owned by one person, and the mineral underneath by another, each with an indefeasible title. When so owned they constitute separate corporeal hereditaments, with all the incidents of separate ownership, and the surface land may be partitioned the same as where there is no mineral under it.

Virginia.

Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020 (1896). The owners of the surface and the underlying minerals where there has been a severance of estates are not tenants in common, and therefore when the surface owner acquires an outstanding interest it does not inure to the benefit of the mineral owner.

Riely, J.: "Land includes everything belonging or attached to it. It includes the surface and whatever is contained within or beneath the surface. It includes the minerals buried in its depths, or which crop out of its surface, and the woods and trees growing upon it.

"And it is now a familiar doctrine that in these various subjects separate and distinct freeholds may be created and owned by different persons by separate and independent titles. One may own the surface, another the

coal, and another still some other mineral, all within the same parcel of land. Each may have a fee or less estate in his respective part."

"The V. C. & I. Co. acquired the title of H. to the minerals and timber and K. acquired the title of C. to the surface. They became the owners of estates in fee in distinct and separate parts of the land; as much so as if they had acquired title to separate portions of a certain parcel of land. 'The division was as complete as if it had been made by lines on the surface.' Their respective estates were the subjects of independent taxation. They were not the owners of undivided interests *in the same* subject at the time K. bought in the V. title, but were the owners of *distinct* subjects of entirely different natures. They did not own interests or shares in the same freehold, but owned separate freeholds, which were separately the subjects of possession, enjoyment and incumbrance. Title to the freehold of one, either in the surface or in the minerals, could not be acquired by adverse possession of the other. * * * The V. C. & I. Co. *alone* owned the minerals and timber; K. *alone* owned the surface. There was no community of interest between them. Hence it has been held that the owner of the surface of a parcel of land and the owner of the minerals under the same are not joint tenants, nor tenants in common. Neill v. Lacey, 110 Pa. 294, 1 Atl. 325, and Powell v. Lantzy, 173 Pa. 543, 34 Atl. 450."

Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593 (1906). The ownership of coal or other underlying mineral may be separated from the surface by a deed of record and thereafter there will be two estates in the same land, and where such separation has taken place the owner of the surface of the land, and the owner of the minerals under it, are neither joint owners nor tenants in common. They are not the owners of undivided interests in the same land, but are the owners of distinct subjects of entirely different natures. The title to the freehold of the one, either in the surface or the minerals, cannot be acquired by adverse possession of the other, and the purchase of the outstanding title by the one does not enure to the benefit of the other.

But the presumption is that the owner of the surface owns all beneath and above the surface, and the burden is upon him who is interested to prove that there has been a severance of the interest and title, either by deed of record, or by proof of such facts and circumstances brought home to the party sought to be charged as will affect his conscience with notice of adverse rights, or will serve to put him upon inquiry which would lead to such knowledge.

Morison v. American Ass'n, 110 Va. 91, 65 S. E. 469 (1909). "The conveyance in question contains all the necessary elements of a valid deed—competent parties, a lawful subject-matter, a valuable consideration, apt words of conveyance, and proper execution. The deed does not limit the estate granted. It sells, without reserve, all the iron ore in question to R. R., his heirs and assigns, forever. There is no suggestion in the deed that the title should revert to the grantor or his heirs at any time or under any circumstances. The language of the deed plainly shows that its clear intent was to convey a fee simple title, and to provide that the mining

privileges should continue so long as any iron remained under the surface of the land."

West Virginia.

Williams v. South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214, 60 L. R. A. 795 (1903). "It is well settled that the different materials which go to make up land may be severed by reservation or express grant. * * *

The very fact of conveying the surface specifically carries with it the idea of an express grant alone of the surface, and severs it from every other material composing the land. A conveyance of any specified interest in the land, such as the coal, or the lime-stone, or the iron ore, or the surface, is an express grant, and severs such interest from every other part of the land, and the title to all the residue remains in the grantor, just as any part of the land would, if reserved specifically in a deed conveying the land.

* * * There can be no question but that the word 'surface' has a definite certain meaning; that it is that portion of the land which is or may be used for agricultural purposes, for plowing, grazing, etc., and that a conveyance of the surface of a tract of land as completely severs the surface from the various strata beneath it as the conveyance of the coal, iron, lime-stone, or any other specified stratum or interest in the land conveys a separate estate."

Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485, 6 A. & E. Ann. Cas. 140 (1905). A conveyance of the underlying coal with the privilege of its removal from under the lands of the grantor "effects a severance of the right to the surface from the right to the underlying coal, and makes them distinct corporeal hereditaments. The presumption that the party having the possession of the surface has the possession of the subsoil also does not exist when these rights are severed."

II. LEASE OF MINERALS OR OF LAND WITH MINING RIGHTS.

p. 51. In view of the recent cases, as has been seen, it is questionable whether it will be held in any jurisdiction or under any circumstances that a demise of all the minerals in a tract of land for a term of years is a conveyance in fee. Such an instrument creates the relation of landlord and tenant, and it is reasonable to treat a demise of all the minerals of a specific kind for a term of years as an estate therein for years, and the tenant therein as a lessee for years, who for all legal purposes is in the same class as a tenant for years of the land with the unlimited privilege to mine. In view of the present tendency of the decisions, the assertion in vol. 1, p. 51, that a true leasehold in minerals in place cannot exist, must be withdrawn. A tenant for years may work open mines to

exhaustion without being guilty of waste. The opening of new mines only is waste as to him. But if he is expressly given the right to take all the minerals, he is then without impeachment of waste and may open new mines and work them to any extent.

Such a tenant's possession of and property in the minerals are the same as his property in and possession of the soil, with the addition that he has the right to remove the minerals, the absolute ownership of which vests in him upon removal.

United States.

Malcomson v. Wappoo Mills, 85 Fed. 907 (1898). C. C. D. S. C. "The instrument itself is called by the parties a 'mining lease.' The words of conveyance are 'hath granted and leased, and by these presents do grant and lease and to farm let.' The thing conveyed is 'the exclusive right to enter upon all the lands of the said G. T. L., situate,' etc., with full description by metes and bounds 'and dig and mine upon the same for phosphate rock and other minerals, to any extent he may require, and carry away and sell the same for his own use'. The consideration is a certain royalty, estimated and payable as stated in the deed."

"If this deed is examined, it will be seen that it gives to P. the exclusive right to mine phosphate rock, as well as the possession. It gives him the exclusive right to enter upon all the lands of the grantor and dig and mine upon the same for phosphate rock and other minerals, to any extent he may require and carry away and sell the same for his own use. It in express terms deprives L., the owner, of mining the lands so long as P. is mining there although he could use them for purposes other than mining. The lessee must mine a minimum of 20,000 tons per year. He must pay all taxes on the demised premises. * * * Under certain circumstances, he can cease mining and can either remain in possession until prices shall rise, or he may surrender the possession to his lessor, who also has the right, on failure of the lessee to perform the covenants of the lease," to re-enter.

On the authority of *Massot v. Moses* (vol. 1, p. 49), this was held not to create a license or incorporeal hereditament, but to be a demise for a term of years, and that the lessor had all the rights of a landlord and might distrain for rent in arrear.

Iowa.

Lacey v. Newcomb, 95 Iowa, 287, 63 N. W. 704 (1895). An agreement called a lease gave to lessee the exclusive right to enter upon and mine coal underlying described land, with five acres of surface for all uses connected with the mine, also rights of way, of water, etc. This lease was to continue for twenty years unless the coal was sooner exhausted, and the lessee agreed to pay as rent or royalty "in full for all the use of the surface

of said land and for all the privileges above specified, and for all coal mined," six and one-fourth cts. per ton, with a minimum of \$200 per annum.

It was held that this was a lease, that it established the relation of landlord and tenant, and therefore the lessor had a landlord's lien, upon an assignment for benefit of creditors by the lessee.

To reach this conclusion the court decides that the contract in question is not simply a sale of the coal. "It seems to us these contracts must be held to be leases creating the relation of landlord and tenant. They confer present rights; they provide for an annual rental independent of the mining of coal; the right to mine the coal is exclusive in the lessees for the period fixed in the lease; the rent or royalty is by express terms payable for all use of the surface of the land, as well as for other privileges specified and for coal mined. In principle, the rights granted are not different from those where one leases a stone quarry or sand bed or the like. The fact that in one case the article taken is on or near the surface and in the other it is beneath the surface is no reason why in the one case privileges granted to take and carry away stone or sand should be held to be leases and in the other the right to mine and carry away the coal and the valuable surface rights granted should be held to constitute a sale of the coal, merely. In either case the sum stipulated to be paid, whether it be called rent or royalty, is a profit issuing out of the use granted even more so than it would be to use the land for agricultural purposes. In the latter case no perceptible quantity of the soil is taken, though the product is produced at the expense of utilizing the strength of the soil. In the former case a portion of the granted property is itself taken. This is in accord with the character of the grant, the use of the thing granted. The sum agreed to be paid is for the use of the land, upon and under the surface; and such use involves the taking away of the coal."

Minnesota.

State v. Evans, 99 Minn. 220, 108 N. W. 958, 9 A. & E. Ann. Cas. 520 (1906). "The propriety of a lease for the purpose of developing and working mines is generally recognized by all of the cases and the rule established by the great weight of authority that such leases do not constitute a sale of any part of the land, and further that iron or other materials derived from the usual operation of open mines or quarries constitute the rents and profits of the land, and belong to the tenant for life or years, and to the mortgagor after sale on foreclosure and before the expiration of the time for redemption."

Therefore a lease of a mine already opened upon school or swamp lands of the state is not in violation of the constitutional prohibition of a sale of any portion of such lands.

Moreover the state may explore its lands, and when iron ore is found thereon open the mines and then lease them; hence the distinction between open and unopen mines is immaterial under that clause of the constitution. "The state, if it desired to realize from its mineral resources, was under

the practical necessity of either undertaking the work of discovering iron ore on its lands and opening mines where ore was found, or securing the doing of such work by individual enterprise, by offering to the successful explorer the exclusive right to a mineral lease of the land on such liberal terms as would be likely to induce parties to assume the pecuniary risk involved in such ventures. The state chose the latter course and the legislature * * * passed the mineral lease statute in question."

Missouri.

Kirk v. Mattier, 140 Mo. 23, 41 S. W. 252 (1897). K. by instrument in writing did "demise and lease" to B. "for mining purposes only, for the term of ten years," certain real estate "dependent at all times upon the full and proper performance of the following conditions," among which were that lessee should sink a shaft to a depth of 200 feet within 12 months, that he should mine in a good and minerlike manner and continuously, pay royalties of 10 per cent on ore sold, keep the land closed to prevent stock from trespassing. The right was given to lessee to erect necessary buildings and machinery for mining and cleaning ore on the land. "And, any time, failure to comply with or perform the requirements and conditions of this lease shall end and determine the same, and the party of the first part may enter upon and hold said demised premises."

K. brought ejectment for the underlying minerals, and proved that lessee had failed to sink shafts the required depth and to mine continuously.

Gannt, P. J., after quoting *Wardell v. Watson*, 93 Mo. 107, 5 S. W. 605; *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597, 34 Am. St. Rep. 645, 18 L. R. A. 702; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760, said. "The grant to dig and mine the zinc and lead ore on this land for 10 years was a lease of the land so demonstrated and so understood. We have no hesitancy in holding that this instrument was a lease, and that, in a proper case, ejectment will lie for the land and the estate acquired thereby. Ejectment will lie for any corporeal hereditament of which the sheriff can deliver possession."

The defendant's contention that the instrument created a license, which was incorporeal and for which ejectment would not lie, was overruled.

Defendant having failed to comply with a condition of the lease, it was subject to forfeiture, and an action of ejectment is sufficient declaration of forfeiture without previous demand.

Rogers v. C. C. C. Mining Co., 75 Mo. App. 114 (1898). Where a lease demises a "parcel of twenty acres of land for the purpose of mining the same for lead and zinc and all other valuable mineral substances, with the right to use the surface thereof in any and all ways necessary or proper in carrying on the operations of mining and reducing and preparing for market and marketing any and all ores obtained therefrom," the lease is as effectual to demise the surface as it is to demise the minerals under the surface, and the party taking possession under the lease is a lessee and not merely a licensee of the premises.

Nevada.

Paul v. Cragaz, 25 Nev. 293, 59 Pac. 857, 47 L. R. A. 540, affirmed 60 Pac. 983 (1900). An instrument, purporting to be a lease of a one-third interest in a mine, provided that the lease should continue for a period of one year, that the lessee should work the mine in a workmanlike manner, and pay to the lessor a certain royalty from all ores extracted and shipped from the mine by the lessee during the continuance of the lease. Held that the instrument was a lease of the lessor's interest in the mine for the term of one year, and not simply a license to extract and work ore at the lessee's option for the period of one year at a specified royalty on ores that he might perchance extract. No particular form of words is requisite to make a lease, but any words that show an intention on the part of the lessor to divest himself of the possession of the premises, and confer it upon the lessee for a term, whether long or short, is sufficient.

Oregon.

Stinson v. Hardy, 27 Or. 384, 41 Pac. 116 (1895). See this case under Chap. XXV, Div. IB.

Pennsylvania.

O'Donnell v. Lusk, 12 Montg. County L. R. 109 (1896). A verbal agreement was made between A. and B. permitting B. to remove stone from A.'s land at a certain sum per perch. No mention was made as to the time to be allowed or the quantity of stone to be taken. A. having notified B. to stop quarrying the stone, brought suit to secure a preliminary injunction. The court holds that the agreement constitutes a lease, that the lessee could only be ejected after legal notice to quit, and that the Act of Assembly provides the proper remedy; and refuses the injunction.

Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197 (1901). See this case on page 42.

Coolbaugh v. Lehigh & Wilkes-Barre Coal Co., 213 Pa. 28, 62 Atl. 94, 4 L. R. A. (N. S.) 207 (1905). See this case on page 45.

Homet v. Singer, 35 Pa. Super. Ct. 491 (1908). A lease of "the right and privilege to quarry stone in and upon the following described premises * * * together with the necessary land for a dump pile, for the term of ten years," establishes the relation of landlord and tenant, and the royalty upon the stone quarried and sold is in the nature of rent.

Utah.

Ruffatti v. Société Anonyme Des Mines De Lexington, 10 Utah, 386, 37 Pac. 591 (1894). The trial court charged the jury "that a parol lease to enter upon mineral land or into a mine, and mine the same for a specified share of the mineral raised, for a definite time, and an entry under such lease, and expenditure of labor and money in running drifts and other prep-

arations for mining under said lease, gives to the lessee a valid, subsisting interest in the real estate which the lessor cannot terminate, unless said lessee has forfeited for some reason his lease to work said mine." On appeal this instruction is held to contain no error.

West Virginia.

Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928, 6 L. R. A. (N. S.) 628 (1905). Plaintiff leased a tract of land for 30 years for the purpose of coal mining and coke manufacturing, with the sole privilege of mining and shipping coal from the premises, and the right to erect and use all buildings and structures necessary for the purpose. It was further provided that, in case the coal was not exhausted at the end of the term, the lessee should be entitled to a further extension until all the coal had been mined. The consideration was a royalty and the lease contained a provision for forfeiture in case of default. This is held to be a lease, a chattel real, taxable to the lessee under chapter 35, page 285, Code of 1905.

Comly v. Ford, 65 W. Va. 429, 64 S. E. 447 (1909). An instrument granting the right to mine and remove the coal in a tract of land for a period of years, and "to take all necessary, usual or convenient means for working and taking away the said coal," creates an estate for years in the land and not a mere mining privilege. And if a term, so created, be for more than five years, it cannot be assigned except by deed or will.

III. INCORPOREAL RIGHTS TO MINERALS.

p. 53.

United States.

Woodside v. Ciceroni, 35 C. C. A. 177, 93 Fed. 1 (1899). 9th Circ. An instrument under seal whereby A. granted to B. his heirs and assigns forever "the right to enter on" a tract of land "for mining purposes only, and to prospect and mine the same, if he should discover any gold quartz suitable for mining," and also a right of way, passes an incorporeal hereditament and not a mere license.

The right of the grantee not being exclusive, there could arise no presumption of its abandonment from the exercise of similar rights by the grantor and his subsequent grantees. Mere failure to exercise such rights would not operate to extinguish them. "It is only where an easement has been acquired by use that its nonuse, without other evidence of abandonment, will extinguish it. An easement created by grant is not lost by nonuse in the absence of evidence of abandonment, or of adverse occupancy."

California.

Baker v. Clark, 128 Cal. 181, 60 Pac. 677 (1900). A quitclaim deed for certain premises stated that the premises were to be occupied and used by the

grantee for the purpose of working a certain mining claim thereon situate. At the close of the habendum clause were the words "for the uses and purposes aforesaid." The deed had been granted in exchange for the right given to the grantor to work other mines owned by the grantee. Held that the deed conveyed merely the right or license to mine on the premises designated therein, and did not pass title to the premises in fee simple.

Arkley v. Union Sugar Co., 147 Cal. 195, 81 Pac. 509 (1905). By an instrument termed a lease, the owner of land on which there was a ledge of lime rock granted to the lessees "the exclusive right and privilege of mining, quarrying and taking lime rock in such quantities as they may see fit" from the deposit situate on the land, such privilege not to "interfere with the right of the lessors, either themselves or by agents or lessees," to mine, quarry and take lime rock from said deposit for the purpose of burning the same and making lime therefrom. The agreement was to be in force for one year, with the privilege of renewal for four more. The lessor sold the land to the defendants, who entered into possession and enclosed the quarry with a fence and excluded the lessees therefrom. The lessees thereupon brought an action for damages for interference with their interest in the quarry, setting up the foregoing facts, alleging that the defendant had taken out 4,800 tons of lime rock and converted the same to its use, and that by reason of the occupation of the quarry by the defendant the plaintiffs were excluded therefrom and had been obliged to abandon negotiations that they had instituted for the sale of rock from the quarry. Held that a good cause of action had been stated and that a demurrer to the complaint was erroneously sustained. The plaintiffs were not asserting any exclusive right to mine the quarry, but were claiming that the defendant did not have such a right. The gravamen is that defendant wrongfully excluded the plaintiffs from entering upon and enjoying their interest in the quarry.

Payne v. Neural, 155 Cal. 46, 99 Pac. 476 (1909). A. contracted with B. granting to B. all the bituminous rock, etc., he might choose to mine, quarry, etc., in certain lands. In case no minerals be found B. might relinquish on 30 days' notice, B. to pay a minimum royalty. B. quarried and removed a little rock, after which he removed his machinery, and never again conducted operations thereon up to his death fifteen years later, though he paid royalty for two years. "We do not regard the contract in suit as a grant of land, or as a lease properly so called, but do regard it as a grant of a right in the nature of an incorporeal hereditament," which right was extinguished by the abandonment of the privileges. The failure of B. to notify A. of his abandonment was immaterial; A. might waive that requirement. This construction is based on the theory that the royalty was the only consideration for the contract.

Connecticut.

New Haven v. Hotchkiss, 77 Conn. 168, 58 Atl. 753 (1904). H. conveyed to the town for park purposes an undivided half of a tract of land, "reserving, however * * * , the right to open a supposed paint mine on said

land, and to work the same thereafter as a paint mine to its full extent, within the limits of the land conveyed; provided, however, that the town of New Haven may at any time within six years from the date of this conveyance purchase and extinguish the right herein reserved, by paying therefor such sum as shall be agreed upon by three disinterested persons." H. opened the mine, put up machinery and took out some of the minerals. No further work was done for eight years when, H. having died in the meantime, his heirs continued operations. Held that the right reserved was an interest in land, but it was an incorporeal right and passed by inheritance. "In so far as the provision in question gave to H. the exclusive right to open and work the mine, and to acquire a full title to the mineral removed, it partook rather of the nature of a reservation than an exception, since such right was greater than that which he had before possessed as a tenant in common with Lambert. That it was intended by the parties to both deeds that H. should have the exclusive right, and not merely a right in common with the grantee or some other cotenant to so open and work the mine, seems clear from the language of the H. deed considered in connection with the L. deed and the circumstances under which both deeds were given." Those circumstances were that L. made a deed of his half interest to the town, and delivered it to H. to be delivered by him to the town if he could make an arrangement acceptable to himself. "From the language of the reservation and the surrounding circumstances, we think it was intended by the parties that H. upon opening the mine within the time limited, and upon finding the product valuable, should have not merely a personal privilege to work the mine during his life, but an absolute ownership of the mining right and of the product of the mine, subject to the right of the town to purchase in the manner provided." "Practically the same effect should be given to this reservation as would have been given to an exception of such rights to open and work the mine in a deed by H. of the entire land conveyed, had he been the sole owner of it."

Michigan.

Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468 (1903). Where a deed conveying land, but reserving to the grantor title to one-half the minerals, granted to the grantee the sole right to mine therein (but not exclusive of the grantor's right also to mine), free of cost or compensation to the grantor, such right is an incorporeal and indivisible hereditament in the grantor's undivided half interest, but gives the grantee no title to the ore in place. Such a right may be assigned or conveyed in entirety, but not in severalty; it may be appurtenant to another piece of land, as, for example, to a furnace property. See this case also on page 234.

West Virginia.

Chapman v. Mill Creek Coal & Coke Co., 54 W. Va. 193, 46 S. E. 202 (1903). C. and H. conveyed to P. 925 acres of land by deed in which there is this language, after the granting clause: "Excepting always that the

parties of the first part hereby expressly reserve to themselves, their heirs and assigns forever, the use and occupancy of any one of the coal banks on said land that they may at any time hereafter, or that either of them or their heirs or assigns may jointly or severally select, together with right of way for ingress and egress to and from same." There were six separate coal veins underlying the land. The heirs of the grantors instituted an action of ejectment to recover one of said coal veins or seams, designating it, and claiming under said exception or reservation from the defendants who claimed title to all the coal under the deed to P. Held that the deed did not reserve the title to said coal, or to any part thereof, and that the reservation or exception would not support an action in ejectment for said coal.

"We are further of the opinion that the exception in the deed, if good for any purpose, reserved only the right to take coal for the purposes for which it was then used in that section from any of the coal veins on the said conveyed tract of land to be selected by the persons mentioned in the deed; and that the terms 'use and occupancy of any one of the coal banks on said land' must be restricted to the purpose of digging and removal of coal for the purposes aforesaid. * * * The exception in the deed being a privilege only, as the right to take water from a spring, or of watering stock at a stream on the lands of another, is an incorporeal hereditament, for which the action of ejectment will not lie."

IV. LICENSES TO MINE.

p. 67.

Illinois.

Entichistle v. Henke, 211 Ill. 273, 71 N. E. 990, 103 Am. St. Rep. 196, affirming 113 Ill. App. 572 (1904). A parol license to mine on the licensor's land, though it may justify acts of the licensee done before formal revocation, is nevertheless revocable at the option of the licensor, and notwithstanding the licensee had expended money or incurred liabilities, or even made improvements, on the faith of the license.

The right to enter upon real estate and dig for and remove ore is an interest in land, and a contract conferring such a right must, under the statute of frauds, be in writing.

"A custom or usage in mining districts that a miner or prospector who had gone upon the premises of another to mine under an oral license should be allowed to remain there and work out the 'prosepct' of ore that he had discovered, against the will of the owner of the property, would be opposed to the well established principles of law declared in the statute of frauds, and * * * it could not prevail against or overcome the statute."

Kellyville Coal Co. v. O'Connell, 134 Ill. App. 311 (1907). This was an action for damages for the flooding of plaintiff's mine caused by defendant's negligence. At the time of the flooding the plaintiff's lease had expired, and

he was operating the mine merely as a tenant at will or by sufferance, or as a licensee under a parol license, and subject at any time to be ousted or have his license revoked.

"Where a mine is operated by a tenant with no obligation on his part to take out all or any certain amount of the coal and his estate therein is of an uncertain or indefinite character, and the coal is necessarily abandoned or lost, or the mine cannot be reclaimed, the right of action for substantial damages is in the lessor or owner of the freehold, and the tenant can only recover the amount of expenses incurred by him and the value of the severed coal and personal property lost by him."

Iowa.

Hosford v. Metcalf, 113 Iowa, 240, 84 N. W. 1054 (1901). Where a parol license is given to mine on the licensor's land, and the licensees, with the knowledge and consent of the licensor, expend labor and money under the license, it becomes more than a mere personal privilege, and may be transferred by the licensees. The licensor could not revoke the license without refunding the expenditure made by the licensees, neither would it terminate with the death of the licensor. The license amounted then to an interest in real estate, a corporeal hereditament. The licensees having an existing exclusive right to mine the land, persons claiming under a lease made by the licensor took nothing by their lease as against the licensees, and are not entitled to terminate the latter's privilege by making compensation. See this case also on page 233.

Kansas.

McCullagh v. Rains, 75 Kan. 458, 89 Pac. 1041 (1907). A parol grant of a privilege of mining constitutes a mere license, revocable by the licensor at pleasure, and vesting no title in the minerals until they are severed by the act of the licensee. The expenditure of money under the privilege adds nothing to the grant. The license is merely a protection to the licensee from the charge of being a trespasser on the lands.

Missouri.

Bingo Mining Co. v. Felton, 78 Mo. App. 210 (1899). A mining company posted mining rules and regulations under §7034, Rev. St. 1889, and opened a mining register, and the defendants signed the register for two mining lots, and entered upon the lots with mining machinery for the purpose of prospecting and mining. Held that "by the act of registering for the lots and entering upon them, defendants became entitled to mine for ore, paying to the owners or lessors of the land the royalty in the time and manner provided by the rules aforesaid. * * * This gave defendants a possession of the lots which could not be forcibly taken from them against their will, without some process of law, or some violation of the rules aforesaid." The fact that the rules provided that the title to all ore pro-

duced from the land should remain in the mining company, and that the money paid to parties mining on the land from the proceeds of the ore sold should be regarded as full compensation for mining the ore, and that the privilege granted those mining on the land to sell the ore produced by them should not be considered or construed as vesting in them the title and ownership of such ore, "does not affect the question of the possession of the miner, in the absence of any action taken by the lessor under the rules for a violation thereof." "The miner cannot, without cause, be arbitrarily dispossessed of his lot. He must have done something in violation of the rules, which have become part of the contract between the parties, before his rights can be forfeited. * * * The license is contractual to be ended only by consent or by condition broken."

Rochester v. Gate City Min. Co., 86 Mo. App. 447 (1900). A miner who works on the lot of a mining company under rules which provide that he is not to have any title or interest in the land or in the minerals mined or not mined has not sufficient possession to entitle him to maintain an action of forcible entry and detainer. He had merely an occupancy by license.

Lowe v. American Zinc, Lead & Smelting Co., 89 Mo. App. 680 (1901). Where one mines upon the lands of a mining company under certain rules and regulations authorized by § 7034, Rev. St. 1889, and signed by the miner, such rules and regulations enter into and form a part of the contract between the miner and the mining company. Where such rules provide that "no right, title or interest in any land, ores or minerals shall be acquired or owned by persons mining on any lot, and it is therefore expressly stipulated that all ores or minerals, whether they remain in the ground or be severed therefrom, shall remain in every event the absolute property of this company," the person mining the land is a mere licensee, without such possession as would enable him to maintain an action of forcible entry and detainer.

Arnold v. Bennett, 92 Mo. App. 156 (1902). Under § 7034, Rev. St. 1889 (§ 8766, Rev. St. 1899), a right to mine land, the person mining to have no property rights in the land or the mineral, except the privilege of mining the latter, constitutes merely a license. A license to dig minerals confers no estate or interest in the soil or mine containing them, or in the ungotten minerals. It is a technical authority to do something on the land of another without passing an estate in the land. It confers a mere incorporeal right to be exercised in the lands of others. It is a profit a prendre and, unlike an easement, may be held apart from the possession of the land.

Therefore, where one trespasses on a mining claim and removes ore therefrom, the right of action in trespass or trover for the value of such ore is in the owner of the land and not in the licensee to mine. Where, however, such licensee is authorized to mine ores on the land for a term of years, he might have an action against such trespasser for damages, if he could prove that the trespasser so diminished the supply of ore that enough did not remain to satisfy his right.

Chitwood v. Lanyon Zinc Co., 93 Mo. App. 225 (1902). In the case of a mere mining license, the title to the ores not dug is in the owner of the fee and not in the licensee, and after the ores are dug the title remains in the owner of the fee, unless there is a special contract to the contrary.

Gregg v. Roaring Springs L. & Min. Co., 97 Mo. App. 44, 70 S. W. 920 (1902). As between tenants in common, where one is in exclusive possession with the consent of the other, §§ 8766-7 have no application. See this case under chapter XXIV, below.

Ashcraft v. Englewood Min. Co., 106 Mo. App. 627, 81 S. W. 469 (1904). Rev. St. 1899, §§ 8766-8767, provide that an owner of mining land may post rules as to the time during which rights to mine thereon shall continue, and anyone thereupon signing the register may mine as a licensee during that time; if no such rules be posted a licensee may mine for three years. No rules having been posted by such a mine owner, a licensee entered and in consideration of a specified royalty sold his mining rights therein to others, the royalty to be paid as long as they operated the mining lots. The assignee, at the end of three years, registered under an agreement with the mine owner to have the right to mine thereon for eight years. Held that after the three years the assignor had no further right to royalties under his assignment.

Currey v. Harden, 109 Mo. App. 678, 83 S. W. 770 (1904). Where a statute (§ 8766, Rev. St. 1899) allows mining companies to make rules and regulations concerning the right to operate their mines, and provides that persons thereafter mining thereon shall be bound thereby and shall forfeit their rights for failure to obey such rules and regulations, and a mining company adopts a rule that those wishing to mine must register, and a person enters and mines without registering, but the company knowingly permits him to do so, the company cannot thereupon forfeit the rights of such miner without first offering him an opportunity to register.

Arbuthnot v. Eclipse Land & Min. Co., 115 Mo. 600, 92 S. W. 170 (1906). An instrument in writing under seal, granting permission to mine on a certain lot so long as the grantees do regular mining work on the lot, is a license and a grant of an incorporeal hereditament; it is not a lease because it does not pass such an estate as would support an ejectment. But whether a verbal contract is a lease or license is immaterial, because §§ 8766-7, Rev. St. 1899, provide that it shall remain in force for a term of only three years. "Where a lessee of mining land plats it and posts rules omitting to name the time for the continuance of miners' rights to operate as required by statute, then the license continues for a period of three years and no longer."

Continental Zinc Co. v. Amsden, Leonord & Co., 125 Mo. App. 512, 102 S. W. 1087 (1907). "A mining licensee is without possessory right and cannot maintain forcible entry and detainer or trespass, and in short is without any legal remedy whatever for injuries to the possession."

Montana.

Clark v. Wall, 32 Mont. 219, 79 Pac. 1052 (1905). Where by verbal agreement one is given the right to mine in certain premises during the will and pleasure of the owner, the right to terminate upon notice to that effect given by the owner, such agreement does not constitute the relation of landlord and tenant between the parties, and the licensee has no right in and to the realty, but merely to the minerals as personalty when severed from the land. If the licensee refuses to vacate the premises when notified so to do by the owner, and continues to mine ore, and is insolvent, the owner is entitled to an injunction to restrain him from further operations on the premises.

Oregon.

Stinson v. Hardy, 27 Or. 584, 41 Pac. 116 (1895). See this case under Chap. XXV, Div. IB, below.

Hall v. Abraham, 44 Or. 477, 75 Pac. 882 (1904). An agreement whereby one gives to another an option to purchase certain premises with the privilege of prospecting and mining thereon may be characterized as a license coupled with an interest, and, the licensee having gone into possession, performed labor, and made expenditures in pursuance thereof, the license is irrevocable. The licensee is entitled to the exclusive right of possession during the continuance of the agreement in force; he has an interest in both the realty and the ores produced from the mine, and cannot be divested of either without his consent, except by virtue of the provisions of the agreement itself.

Pennsylvania.

Chalfant v. Rocks, 212 Pa. 521, 61 Atl. 1105 (1905). An agreement provided that "L. doth bargain and sell unto the aforesaid C. all that certain tract or parcel of coal containing three acres for the sum of three hundred dollars, situated, etc. * * * The said C. is not to sell any coal only what he hauls himself or have hauled, also cannot sell the said three acres of coal to any person or persons but L. his heirs or assigns.

* * * But has no privilege of surface. Said C. has the privilege of dumping."

C. having died, his heirs could not maintain ejectment. The agreement "cannot reasonably be construed as more than a personal license." "There is no indication of any further instrument being in contemplation, and the restrictions in this one are incompatible with a conveyance in fee, but entirely in harmony with a personal license."

Cole v. Ellicood Power Co., 216 Pa. 283, 65 Atl. 678 (1907). "If a license, or privilege, to do something on the land of the licensor is given by parol, then followed by the expenditure of money, on the faith of the parol agreement, it is irrevocable and is to be treated as a binding contract. Equity treats the license thus executed as a contract giving absolute rights, and

protects the licensee in the enjoyment of those rights." A parol lease of a quarry upon which money has been expended confers a property right for which damages may be recovered, when it is taken in condemnation proceedings.

Wisconsin.

St. Anthony Min. & Mill. Co. v. Shaffra, 138 Wis. 507, 120 N. W. 238 (1909). A mining lease or license within St. 1898, c. 75, is irrevocable after a valuable discovery or prospect has been struck, except where the miner forfeits his rights by negligence such as establishes a forfeiture according to mining usages.

This act, § 1647, declares that the discovery of a "crevice or range" containing ores or mineral shall entitle the discoverer to the ore or mineral, subect to the rent due the landlord, before as well as after separation from the freehold. "Crevice or range" in its local significance meant a mineral bearing vein, and not the ore bodies belonging to the same geological stratum and covering a large district. Under this section the miner who is operating, under a lease or license from the owner of the land terminable at the will of the latter, is given the right, in case he discovers a prospect, to continue his exploration free from any right of the lessor or licensor to cut him off by relocation before the prospect so discovered was explored sufficiently to determine whether it would lead to a discovery or not, and in case he discovers a crevice or vein, to entitle him to follow that deposit of ore within the lines of the land upon which he was licensed to work lengthwise, sidewise and downward until he had exhausted the crevice or vein, paying the agreed or customary tribute or royalty to the landowner in the meantime. "Discovery" does not mean the development and uncovering of a mineral deposit in a known mineral bearing lot and alongside of the old workings which had existed long prior to the inception of the license.

V. OIL AND GAS LEASES.

p. 74. It follows logically from the unstable and fugitive nature of oil and gas that they are not capable of distinct ownership in place apart from the soil in which they happen at any time to be. The creation, therefore, of a corporeal estate therein while in the ground by deed or reservation, which attempts their severance from the surface, is impossible. This view, which was stated in the first volume of this work, has been further emphasized by the recent cases in Indiana and Pennsylvania. (These cases are collected on pp. 94-101, below. See, also, Chap. I, Div. V.) In West Virginia, however, the courts have lately taken the position that there is no difference between the stable and the un-

stable minerals so far as the nature of the property that may be had in them is concerned. This view has also been followed in Kansas and Texas. Since these cases stand by themselves, and find no place in the classification adopted by us, yet are important as illustrating the view of the courts of two of the most important oil producing states, they are here collected.

Kansas.

Moore v. Griffin, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. (N. S.) 477 (1905). The owner of land, having first executed an oil and gas lease, conveyed the land, reserving all the rights, privileges and benefits secured to him under the oil and gas lease, adding "it is intended hereby to reserve all oil and gas privileges in and to said premises and to lease and transfer the same." This was held to be an exception. "Different estates may be created in the surface and soil of lands and the underlying strata in which minerals, oils and gas may be found; and this separation of estates may be accomplished by an exception in the deed conveying the lands, by which the grantor carves out and retains the right to the minerals in the land. The right retained by the exception is the ownership of the minerals." The force and effect of the exception in this case "was to carve out a separate estate in the oil and gas from the estate in the surface and soil. The title to the surface and soil passed to the grantee and the title to, and ownership of, the oil and gas in the lands remained with the grantors."

Texas.

Southern Oil Co. v. Colquitt, 28 Tex. Civ. App. 292, 69 S. W. 169 (1902). A conveyance to a grantee, its heirs and assigns, of "all the oil, gas, coal and other minerals in and under the homestead of T and wife, together with the rights of ingress and egress at all times, for the purpose of drilling for oil, gas, or water, reserving to the said T one-tenth of all the oil produced and saved from the premises," with the provision that five years were given within which wells should be sunk, but that a forfeiture could be prevented by paying an annual rental of twenty-five dollars until the wells were completed, is such a conveyance of a part of the homestead as requires the joinder of the wife under Bates Ann. Civ. St. art. 636.

"It is held that oil in place under the soil is a mineral and that minerals in place are land. An oil lease investing the lessee with the right to remove all the oil in place in consideration of his giving the lessor a certain per cent thereof is in legal effect a sale of a portion of the land. * * * Such a contract, as above stated, is a conveyance of the land."

West Virginia.

Harris v. Cobb, 49 W. Va. 350, 38 S. E. 559 (1901). A deed by which a tract of land was conveyed in fee contained the provision: "The parties

of the first part reserve unto themselves and do not convey by this deed the equal one-half part of the usual royalty of one-eighth of all the petroleum or oil in and underlying the tract of land hereby conveyed." Held to be an exception of the title in fee to the one-sixteenth of the oil in place and underlying said tract of land, to be delivered to her when produced, without expense to her for production. The grantee in the above deed leased the land to another with exclusive right to operate for oil and gas, reserving one-eighth of the oil to be set aside in the pipe line to his credit. This was held not to refer to or include the one-sixteenth outstanding in the original grantor. "The parties [to the first deed] were conveying real estate, and their declaration that they were not conveying or intending to convey a certain part of a substance as much a part of the real estate as the soil itself, and as much a subject of transfer as coal, iron or other mineral, clearly made it an exception."

Preston v. White, 57 W. Va. 278, 50 S. E. 236 (1905). A deed conveying a tract of land contains the clause: "But it is expressly understood and agreed that there is reserved from and not included in the above sale or conveyance seven-eighths of all and any oil and gas that may be on, in or under the said land, with full right and privilege to said Bennett, his heirs and assigns, to develop and operate the same." This excepts, and does not pass to the grantee, the oil and gas in place in the land, and the oil and gas remained vested in the grantor as an actual, vested estate and property, and not an incorporeal hereditament in him, nor a mere license to produce oil and gas, and title in the grantor to the oil and gas is not in abeyance, to vest only when the oil and gas shall be developed and brought to the surface by the grantor. A subsequent conveyance by such grantor of such oil and gas vests in the grantee like estate and property in the oil and gas as was vested in such grantor. The owners of the undivided seven-eighths of the oil and gas having brought a bill for partition, the court ordered a sale thereof, holding that these minerals were not susceptible of division.

"Oil and gas in place are a part of the land itself. But when the owner of land conveys to another the oil or gas, that oil or gas becomes a property distinct from the residue or remnant of the land, distinct from the 'surface', as the expression is in the books. The oil and surface are then two properties under distinct ownership, but the oil none the less a real corporeal property than the surface or soil itself. Being part of the land, and thus owned by the owner of the land, he can sever its ownership. * * * When thus severed in ownership, the owners own two separate interests and are not cotenants. When thus severed in ownership, the minerals become a separate corporeal hereditament, and their ownership is attended with all the attributes and incidents peculiar to ownership of land. Oil and gas are minerals and fall under these principles."

"It makes no difference that oil and gas are fluent and wandering for the present question. White and the Bennett heirs might lose the oil and gas by their migration from the land. If it were a contest between

them and an adjoining owner, after production of oil on his land, then this character of oil and gas would be relevant; but it is not relevant in deciding the character of the ownership of the Bennett heirs in the oil and gas. The oil and gas are deemed yet in the land for the question before us."

Peterson v. Hall, 57 W. Va. 535, 50 S. E. 603 (1905). There may be separate, distinct estates in different persons in the surface of land and oil and other minerals in it. When the surface of land is owned by one person, the oil in place by another, a sale for taxes in the name of the owner of the surface will pass also the oil owned by the other person. his estate not being charged on the tax books, under § 25, c. 31, Code 1899.

Toothman v. Courtney, 62 W. Va. 167, 58 S. E. 915 (1907). See this case on page 74.

A. Lease of Lands with the Privilege of Digging and Boring for Oil or Gas.

p. 75.

United States.

Allegheny Oil Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764 (1900). 6th Circ. For the consideration of one dollar, the owner of land leased it for the purpose of removing oil and gas therefrom, together with certain privileges to enable the lessee to remove the same from the premises, the lessee to enjoy the estate for the term of two years and as long thereafter as oil and gas should be found in paying quantities, not exceeding twenty-five years, for which the lessee was to render the lessor one-eighth of the oil and pay \$150 annually for any well producing gas in sufficient quantities to justify marketing. The lease further provided, "In case no well is drilled on the said premises within two years from the date hereof, the lease shall become null and void unless the lessee shall pay for the further delay at the rate of one dollar per acre at or before the end of each year."

It was contended on behalf of the lessor that the consideration of one dollar might support the grant for two years, but the privilege of extending the same beyond that term was supported by no consideration and was entirely at the option of the lessee. The court held that the lease constituted an entire contract and that the consideration recited supported not only the grant of the two year's term, but the privilege of extending the time of drilling by paying the stipulated price therefor.

No hardship was worked to the landowner because of the possibility of tying up his land for speculative purposes because "this contract, in view of its peculiar purpose and object in the development of gas, has written into it an implied covenant on the part of the lessee that he will drill and operate such number of oil wells on the land as would be ordinarily required for the production of oil contained in such land and afford

ordinary protection to the lines. This was the holding of the Supreme Court of Ohio in *Harris v. Oil Company*, and has become a rule of property in Ohio."

By the Ohio Statutes, Rev. St. §4112a, all leases and licenses giving the right to operate for oil or gas must be recorded. The instrument in this case had but a single witness and was unrecorded, and it was held that under the Ohio decisions it might be treated as a good agreement in equity for the making of a lease.

Moore v. Sawyer, 167 Fed. 826 (1909). C. C. E. D. Okla. An instrument which, in consideration of \$50, granted "all the oil, gas, coal and asphaltum in and under the following described premises," reserving to the first party one-tenth of all oil produced, for the term of fifteen years, and as much longer as oil, gas, coal or asphaltum is found or produced, or the rental paid, and which provided that the sum of \$50 paid "is the consideration for the right of the party of the second part to pay said rental and hold said lease during said term, or until said development or developments as above provided are completed," is not a conveyance in fee of the mineral in place, but is merely a lease, the \$50 mentioned being a bonus paid or agreed to be paid to induce its execution.

California.

Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 Pac. 483 (1909). A lease of land for years for oil and gas purposes vests no present title in the oil in place, but leaves that title in the lessor until the oil is brought to the surface. "The right vested in lessee is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes, for the term prescribed, a servitude on the land and a chattel real," but is taxable to the lessee as a separate estate in the land.

Kansas.

Monfort v. Lanyon Zinc Co., 67 Kan. 310, 72 Pac. 784 (1903). A lease, based upon an otherwise sufficient consideration, which gives to the lessees or their assigns the exclusive right for ten years to enter upon the leased premises and prospect for oil, gas, and minerals, and, if oil or gas is found in paying quantities, the privilege of operating such wells as long as either can be produced in paying quantities, and further providing that if no gas well is sunk on the premises within five years, the lease shall become null and void, unless the lessees or their assigns shall elect from year to year to continue the lease by paying \$40 each year in advance to the lessors until a well is completed on the premises, is a grant of a right to the use of the premises for the term of ten years, conditioned on the payment of \$40 per year in advance after the expiration of the first five years.

Ohio.

Woodland Oil Co. v. Crawford, 55 Ohio, 161, 44 N. E. 1093, 34 L. R. A. 62 (1896). C. "granted, demised and let unto" U. "all the petroleum and gas in and under that certain tract of land hereinafter described and also the said tract of land for the purpose and with the exclusive right of drilling and operating upon said premises for said petroleum and gas" for five years, and as much longer as oil or gas is found in paying quantities thereon. The consideration was one-eighth part of the oil produced and \$200 per annum for each gas well. It was also agreed that a test well should be completed within two miles within one year, "or in default thereof pay to the parties of the first part, for further delay, a yearly rental of \$128," etc. "And a failure on the part of the second party to complete such well or wells as above specified, or instead thereof to pay the rentals as above provided, shall render this lease and agreement null and void."

U. assigned this lease, and his interest therein and in the premises, to the W. Co., subject to the rents and royalties and covenants thereof. No test well having been drilled, C. sued W. Co. for the amount stipulated for delay as above and was held to have a right to recover.

Burket, J.: "This is more than a license; it is a lease of the land, oil and gas for a limited time and purpose, with a right of possession to the extent reasonably required for such purpose, the landlord retaining all that should not be so required."

"The proper construction to be placed upon such an agreement is, that upon failure of the lessee to drill a well, or pay the rental, or both, as the case may be, the lessor may elect to put an end to the lease, and enforce payment of the promised rental, or sue for damages for failure to drill the well, or he may elect to have the lease continue in force to the end of the term and enforce the drilling of wells, and the payment of rentals as provided in the lease. Such provisions of forfeiture are for the benefit of the lessor, and not for the benefit of the lessee. The lessee cannot plead his own default or wrong, in discharge of his obligation to drill or pay rental. Parties may agree that in case of failure to drill or failure to pay or both, the lessee shall be relieved of his obligation upon such terms as the parties may agree upon in the lease, whether the terms be of value to the lessor, or loss or inconvenience to the lessee, but a naked default and nonperformance, as in this lease cannot be held to discharge the obligations of the lessee."

"It would also be competent for an owner of land to give an option to another party, upon a sufficient consideration, to drill one or more wells within a stated time and upon failure to drill such wells within the time limited, all rights to cease as to both parties. And it is contended by the oil company in this case, that the leases in question are such options, or else are mere unexecuted licenses. In case of an option, a certain consideration is paid or agreed to be paid to tie up the land for a given time, and during that time the owner is prevented from using or disposing of

the land contrary to the terms of his contract. But in such cases the consideration for the option must be paid, and cannot be satisfied by a naked default. If such default could be held as satisfaction of the consideration, the instrument would be without consideration and therefore void."

"The same result follows if the instruments be regarded as unexecuted licenses. The consideration paid and agreed to be paid for the license is one dollar paid and certain rentals to be paid, and the licensor not having interfered with the rights of the licensee, the latter is bound to pay the full consideration promised for the license, even though he never avail himself of its privileges.

"So that whether the instruments in question are regarded as leases, options or licenses, the plaintiff below is entitled to receive the consideration or rental agreed to be paid."

The acceptance of the assignment bound the assignee to perform all the unperformed covenants of the lease.

The amount which the lease stipulated should be paid for delay was rental. The plaintiff was entitled to recover it as rental, and was not merely entitled to unliquidated damages.

Harris v. Ohio Oil Co., 57 Ohio, 118, 48 N. E. 502 (1897). "By the terms of the lease in this case, the lessor for a valuable consideration granted, demised and let the lands described to the lessee, for the purpose and with the exclusive right of drilling and operating for petroleum oil and gas for five years, and as much longer as oil and gas are found in paying quantities. In this case, as in the case of *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, it is the land that is granted, demised and let for the limited purpose and period named in the lease. An instrument in such form is more than a mere license; it is a lease of the land for the purpose and period limited therein, and the lessee has a vested right to the possession of the land to the extent reasonably necessary to perform the terms of the instrument on his part.

"In this case, possession was delivered to the lessee and operations commenced, wells drilled and oil produced in paying quantities, and in such cases it cannot be doubted that the lessee has a vested though limited estate in the lands for the purpose named in the lease" See this case also on page 124.

Brown v. Fowler, 65 Ohio, 507, 63 N. E. 76 (1902). An instrument which grants the oil and gas in a tract of land and also the land for the purpose of operating thereon for said oil and gas is a lease and not merely a license. A provision therein that the lessee should have the right to surrender it at any time for cancellation, "after which all payments or liabilities under it should cease and the lease become void," does not reduce the term to an estate at will. The consideration of one dollar having been paid for the whole lease included this clause, and the lease was therefore not void for want of mutuality. See this case also on page 195.

Central Ohio Natural Gas & Fuel Co. v. Eckert, 70 Ohio, 127, 71 N. E. 281 (1904). A grant to a corporation, its successors and assigns, without

limitation as to time, of "all the oil," etc., was upon the following terms: "First. Second party agrees to drill a well upon said premises within six months from this date, or thereafter pay to the first party \$160. annually until said well is drilled, or the property hereby granted is re-conveyed to the first party. * * * * Seventh. Second party may at any time remove all their property and reconvey the premises hereby granted, which conveyance said first party agrees to accept, and thereupon this instrument shall be null and void." After the expiration of six months, and until a well is drilled, this is a lease, at an annual rental of \$160, at the option of the lessee only. "This is no mere tenancy at will. There is a good and valid consideration for the option granted by these instruments, and it is immaterial whether they are called leases, deeds or written agreements. The intention of the parties is to control, and it is manifest that it was not the intention of either party that the right granted by the instrument should be a mere license that could be terminated by the grantor at any time."

Pennsylvania.

Wettengel v. Gormley, 184 Pa. 354, 39 Atl. 57 (1898). For the facts see *Wettengel v. Gormley*, 160 Pa. 559, 28 Atl. 934, 40 Am. St. Rep. 733, vol. 1, p. 77. Williams, J.: "The legal operation of this lease, as between the lessor and the lessee, 'their heirs, executors or assigns,' was to sever the leasehold from the freehold estate. Thereafter the exclusive right of access to the oil bearing stratum was in the lessee, whose duty was to develop and operate the leasehold estate for oil and gas. The exclusive right to cultivate the surface, subject to the easement created upon and over it in aid of the operations of the lessee, was in the lessor and his tenants. A sale of the freehold to any person having notice, actual or constructive, of the lease would have been subject to its provisions, and would in no way have impaired the rights or interests of the lessee. The purchaser would have taken just the estate his vendor was competent to convey, and he would have held it subject to the terms of the lease in every particular. The estates were separate, independent and in independent hands. The one was personal, an estate for years. The other was real, a fee simple. The right to receive or demand the rent was a chose in action that would fall, under our intestate laws, to the personal representative of a decedent. The heir could not disturb or interfere in any manner with the production of oil or gas pending the settlement of the estate of the testator, or with the collection of the royalties. But Gormley made a will, by the terms of which he severed the six hundred acres into three tracts or farms, and devised one of these to each of his three children. They took the title precisely as the testator held it, subject to all the provisions of the lease. As between themselves, the division of the surface was absolute; but as to the holder of the leasehold, each took the part devised to him, subject to the common burden which had been put upon the entire body of the land as a single undivided tract containing six hundred acres, more or

less. As the lease covered all the land, so the rent may be said to issue from each and every part of it. The royalties belonged to the owners of the six hundred acres, and not to the owner of any subdivision of it. But as we have seen the royalties were personal. They were not disposed of by Gormley's will. They were not even referred to in it. The intestate laws must in such case be looked to for the disposition of this very considerable part of his estate. The children hold together all the acreage that is covered by the lease, and each should receive such share of the royalty as his or her share of the land bears to the whole tract covered by the lease. It does not matter in what acre or hundred acres the wells may be situated. The royalties are not payable by the acre, nor by the farm into which the surface may be divided, but upon the total production, wherever within the six hundred acres the production may take place.

"There is no escape from this proposition. The cleaver of the testator applied by the terms of his will for the division of the lands between his children made a clean cut separation of the shares of each down till the leasehold was encountered. There its descent was arrested until the term created by the lease expires. When that occurs its downward course will be instantly resumed and the severance of the freehold and its minerals will be complete. The further reflection bestowed upon this question has in no sense shaken our confidence in *Wettengel v. Gormley*, 160 Pa. 559, 28 Atl. 934, 40 Am. St. Rep. 733. We adhere to it."

In addition it is decided that the child upon whose land the wells were sunk was entitled to compensation for the decrease in the rental value of his part caused by the presence of the wells, and that the cost of repairing injuries thereto caused by sinking the wells should be postponed until the termination of the lease made it possible to consider that question intelligently.

Hanna v. Clark, 204 Pa. 149, 53 Atl. 758 (1902). "The appellant further contends that the partition proceedings were incomplete and irregular because the court did not partition the oil in and under the lands, or produced or to be produced from the same, among the parties entitled thereto.

"It is sufficient answer to this to say that the record shows that part of the lands involved were subject to prior leases, which were in force. These could not be disturbed. The interest in the lands and in the oil leases were separate and independent. One was personal, the other real. *Wettengel v. Gormley*, 184 Pa. 354, 39 Atl. 57."

Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 Atl. 207 (1909). "The language of the agreement in the case at bar shows it to be a lease, conveying an interest in land, a corporeal and not an incorporeal hereditament. The lessor does, in the language of the lease, 'grant, demise, lease and let unto the said party of the second part * * * all that certain tract of land * * * containing one hundred acres, * * * for the sole and only purpose of mining and operating for oil, gas and other minerals and of laying pipe lines and of building tanks, stations and structures thereon to take care of the said products.' It will thus be seen, by this transposition of the language of the lease, that the land

itself is granted and demised, and not simply the right to enter upon and prospect and operate for oil or gas. It is not simply a privilege given to the lessee to use the premises for mining purposes but the land itself is demised with the right to obtain the minerals therein. By the agreement the exclusive right to take and appropriate all the minerals is conveyed, and during the term of the lease the lessor has no right to enter and operate for oil or gas. The title to the oil except the one-eighth thereof is vested in the lessee, as is also the title to the gas and other minerals in the land. Under the rule of construction established, not only in other jurisdictions, but by our own cases, therefore, the agreement creates a corporeal interest in the lessee in the demised premises, and is not merely a license to enter and operate for oil and gas."

"The defendant contends that, conceding the contract in question to be a lease and not a license, the plaintiff cannot maintain ejectment as he had not entered into possession of the premises. We are aware of the rule at common law which in the case of an ordinary lease requires the lessee to have been in possession of the premises before he can maintain ejectment against any one who had ousted him. That is the rule recognized and followed in this state where real property is demised for the purpose of occupancy and use by the tenant. But we are not disposed to enforce it in cases like the present where by the contract the lessee is granted the possession of the land with the sole and exclusive right to mine and remove the minerals therein. In such case, while the tenant is regarded as a lessee, yet by the agreement he obtains title to the minerals and the right to the possession of the premises for removing them. As said in *Duke v. Hague*, 107 Pa. 57, the tenant has an absolute right of possession of all the surface necessary to enable him to drill and remove the oil and no one else can rightly take out oil during the term, save under him. The contract gives him the right to the oil and to the possession of the land to enable him to remove it. As also said in the *Duke* case, the whole of the oil, or only a part, may be taken under the lease, but whatever shall be taken is of the substance of the realty. Having acquired by the contract a right to a part of the realty, the law should give the lessee an adequate remedy to enforce that right. Ejectment is the proper action for the recovery of possession of land in this state. It is a possessory action, and if a party has a right to possession and the immediate right to enter, he may maintain ejectment. Here the lessee has the right to the possession of the premises, the immediate right to enter, and the right to take the oil therefrom which is a part of the realty. It will be observed that the lessee has not simply the right to the possession of the premises, but also the title to the oil or such part thereof as he may be able to remove during his tenancy."

West Virginia.

Headley v. Hoopengartner, 60 W. Va. 626, 55 S. E. 744 (1906). "This is the ordinary oil and gas lease, with a reversion to the grantors, for the purpose of mining and operating for oil and gas, laying pipe lines, building

tanks, stations and structures thereon, and, in consideration thereof, to pay as royalty a one-eighth part of all the oil produced and saved from the leased premises. While we have some cases which may be construed to hold that the ordinary oil lease, investing the lessee with the right to remove all the oil, in place in the premises, in consideration of a certain stipulated royalty, is, in legal effect, a sale of a portion of the land, yet these cases do not conform to many others, which treat such contracts only as leases, and a conveyance for a term of years, and not to pass an estate in fee. We do not think the lease in question can be so construed as to be other than a contract which passes only an estate for years. 'A lease is a contract for the possession and profits of lands and tenements on the one side, and the recompense or rents on the other, or, in other words, a conveyance to a person for life, years or at will, in consideration of a rent or other recompense.' 18 Am. & Eng. Ency. Law (2d ed.), 597. And a lease is defined to be, by Blackstone, properly a conveyance of lands or tenements in consideration of rent or other recompense, made for life, for years or at will, but always for a less time than the lessor hath in the premises, because if it be for the whole interest, it is more properly an assignment than a lease. In fact, there is no difficulty in determining the requisites of a lease. There is no difference of opinion as to that; the definitions are uniform, but the difficulty is in always determining whether or not the particular paper or contract falls within the definition. Apply the definition to the contract here, and we find that it falls clearly within the true meaning of the word lease. It conveyed an estate less than the lessor had in the premises; it was to remain in force for the term of three years from its date, and as long thereafter as oil or gas, or either of them, was produced from the premises by the lessees; it contained the usual words essential to its operation, which are, grant, lease and let; it gives to the lessees the right to the possession of the lands for oil and gas operations, with the profits derived therefrom, and, on the other hand, the lessor is to be recompensed by his receiving a certain part of the production as royalty. It cannot be said that the provision in the lease, which says that it shall remain in force as long after three years as oil and gas, or either, is produced by the lessee, can be so construed as to detract from it the essentials of a lease, and make it such a conveyance as to pass the whole estate to the lessee. This is an optional provision, and there is a clause reserving unto the lessees the right to surrender the lease for cancellation at any time."

The instrument in question being a lease, there is consequently an implied covenant of quiet enjoyment.

Toothman v. Courtney, 62 W. Va. 167, 58 S. E. 915 (1907). T. by instrument in writing, called an "oil lease" granted to F. all the oil and gas in and under certain land for the term of seven years, and so much longer as oil or gas is found in paying quantities thereon. The lessee agreed to drill a well within ten months, or thereafter pay a fixed yearly rental until such well was drilled. If oil was found in paying quantities he was to deliver one-eighth of the product to the lessor, and if gas was found he

agreed to pay a fixed yearly rental for each well. This was held not to pass the fee simple title to the oil and gas, but to be a lease thereof, vesting in F. a right of exploration and production, leaving the fee simple title to the oil and gas in the lessor. The conveyance is limited to a term of years. "By the discovery and production of oil and gas, or one of them, the specific term of seven years may be greatly prolonged, but tested by the letter of the deed and probably by its spirit as well, the term does not cease to be a mere term by the prolongation thereof. However long the term, an estate for years is not a freehold. Moreover, this deed implies that so much of the corpus as is conditionally granted is to be severed and removed from the land, and the implication is reinforced by conditions annexed to the grant which compel the grantee to take the oil and gas. The instrument does not contemplate a continuing and interminable ownership of the gas and oil in place, but rather a limited right of possession and use of the land for the severance, conversion into personal property and removal of certain portions thereof." T. then conveyed to M. one-sixteenth part of all the oil and gas in the land, and subsequently by deed to W. conveyed the land, reserving "all the oil rental." "Though he did not reserve by name the oil in place, or any part of it, his reservation of all the rental or royalty to be derived from it compels the court to hold, by construction of the instrument, that it vests in him the title to that thing, the beneficial interest whereof has been reserved, namely, the oil in place."

T's title, however, was not to the whole, but to an undivided part of the oil, and could not be separately assessed for taxation under chaps. 12 and 29, Code of 1899, and such an assessment and a tax sale thereon is void.

Options and Rights of Exploration.

In *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732 (vol. 1, p. 174), it was decided that a lease of undeveloped land for the purpose of operating for oil and gas for a fixed term and so long as those minerals were found in paying quantities did not vest any immediate right of property in the lessee. "The title is inchoate and for purposes of exploration only, until oil is found. If it is not found no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract." Such a lease is "not a grant of property in the oil, but merely a grant of possession for the purpose of searching for and procuring oil" (*Barnhart v. Lockwood*, 152 Pa. 82, 25 Atl. 237, vol. 1, p. 77). This case has been followed in all the oil producing states except Ohio. (See cases on p. 69.) An oil or gas lease, where the land is unde-

veloped and the purpose is the discovery of the mineral, is a mere option, conferring on the lessee the right to explore. He may lose this right by abandonment. And on the other hand, if he fails to make such efforts to find mineral as the instrument requires of him, or, in the absence of such requirement, if he is not reasonably diligent in pursuing the work of exploration, the lessor may avoid the lease. Exploration is thus a condition of the continuance of the privilege conferred by the lease.

When, however, the mineral is found "in paying quantities," what was before a mere option ripens into a lease, title vests in the lessee, and the rights of the parties are governed by the relation of lessor and lessee and by the terms of the instrument.

An option, of course, requires a consideration to support it. In the case of a so-called oil and gas lease this may be either a present valuable consideration or a covenant to develop or operate or to pay rent. If the instrument is without consideration the lessor is not bound by it and may avoid it at any time before actual development is begun by the lessee. The leasing of the property to another is an efficient exercise of this right to annul. If, however, the lessee has begun work under the lease, he then has the right to go on with his search for minerals, and the lessor cannot deprive him of this right. The exploration and development are the consideration.

If, as is often the case, the lease contains a provision that the lessee may surrender it at any time and thereby terminate further liability thereunder, he is enabled at any time to relieve himself of the obligation of development, which is the consideration which supports the lease. In Texas and West Virginia this provision is held to destroy the consideration, so that the lessor may annul it at any time before performance by the lessee of his covenant to develop. In Illinois, however, this provision does not relieve the lessor from the obligation of his contract, but deprives the lessee of the remedy of specific performance. (See criticism of this position in "Mutuality of Obligation and Remedy as a Requisite to Equitable Relief," by H. C. McClintock, 58 U. of P. L. R. 16.)

United States.

Huggins v. Daley, 40 C. C. A. 12, 99 Fed. 603, 48 L. R. A. 320 (1900). 4th Circ. A tract of land in West Virginia was granted for the purpose of operating thereon for oil and gas "for the term of five years and as much

longer as oil and gas is found in paying quantities thereon," for a royalty of one-seventh of the oil produced and saved on the premises, "Provided, however, that a well shall be commenced upon the above described premises within 30, and completed within 90, days from the date hereof; and, in case of failure to commence and complete said well as aforesaid, the lessee shall pay to the lessor a forfeiture of \$50." Held that the exploration for and development of oil and gas was the sole consideration for the lease; that the proviso requiring the boring of a well within 90 days was a condition precedent to the vesting of any interest in the lessee, and that the forfeiture of \$50 was intended merely as a penalty to secure the drilling of the well, and, if paid, would have been merely compensation to the landowner for the right of the lessee to possession during the 90 days, and such payment would not be so far a compliance with the conditions of the lease as to vest in the lessee a title in the leased premises for the period of five years; that after the expiration of 90 days from the date of the lease, there being no provision therein for any work by the lessee in the development of the property, which was the sole consideration therefor, the lessor had the option to avoid it; that the inaction of the lessee during a period of eight months, while operations were being commenced on adjoining land calculated to drain the land of the lessor and irreparably injure him, fully justified his avoidance of the lease; and that his subsequent leasing the same premises to another party was an unequivocal declaration of his intention to avoid it, and terminate any inchoate right which the lessee could claim thereunder.

Federal Oil Co. v. Western Oil Co., 57 C. C. A. 428, 121 Fed. 674, 7th Circ., affirming 112 Fed. 373 (1902). C. C. D. Ind. An oil and gas lease, for the consideration of \$1, granted to the lessee all the gas and oil in and under the premises, with the right to enter for the purpose of drilling and operating for oil and gas, the lessor to be given one-eighth of all oil produced and saved from the premises. In case no well was commenced by the lessee within a day, the lease was to become null and void unless the lessee should pay to the lessor \$8.75 per month while the commencement of the drilling of the well was delayed. A second well was to be completed 90 days after the first well, and another well each 90 days thereafter until seven were drilled. Held that a court of equity would not enforce specific performance of the terms of this lease at the suit of the lessee, as the lease was unfair and unconscionable and without mutuality. The lease does not compel the lessee to commence or prosecute operations for developing and exploiting the premises. The lessor's royalties arise only if the lessee begins operations. The covenant to complete a second well within 90 days after the first is valueless, because there is no agreement by the lessee to drill the first well. The lessee is under no obligation to pay the monthly rental of \$8.75, and the lessor could maintain no action to recover the same. "Such a lease is without consideration and must be held a nudum pactum and void. A lease so unfair, inequitable, and against good conscience, no court ought to enforce."

"The legal effect of the instrument here in question is, therefore, the grant of a mere use for the purpose of prospecting. The title is inchoate,

and for the purpose of exploration only until oil or gas is found. If not found, no estate vests in the lessee, and his title, whatever it is, ends with the abandonment of the unsuccessful search. If found, the right to produce becomes a vested right and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract."

Doddridge County Oil & Gas Co. v. Smith, 154 Fed. 970 (1907). C. C. N. D. W. Va. "Numerous cases have defined and settled the law touching these oil and gas leases, and, because of the uncertain, indeterminate and fleeting character of the product sought, have virtually decided them to be sui generis, requiring peculiar rules to govern both their construction and operations under them. Among these principles, it is held that such a contract is not a grant of land, nor a present leasehold interest therein. It is not a grant of the oil itself, in place, or under the land, but only the right to search for it. If the search is fruitless, the explorer loses. On the other hand, if the search is successful, the explorer obtains vested right as a tenant the same as in other leasehold estates for the purpose of operating for the oil which his search has discovered. Whether a tenancy in the true sense exists, depends, therefore, on whether oil or gas has been actually found or not. Again, the duty and obligation of the tenant or lessee, after oil or gas has been found, depend on the peculiar character of the product. It may be that the same lessee may own the adjoining property or properties, or have more advantageous leases thereon. He cannot be permitted, after drilling a single well upon the first, to move therefrom or cease operations thereon, for the purpose of drilling or suffering to be drilled numerous wells on adjoining lands that will drain the first and give an undue part of the product to the others. He must be diligent and active in development." See this case also on page 206.

California.

Brookshire Oil Co. v. Casmalia Ranch Oil & Developing Co., 156 Cal. 211, 103 Pac. 927 (1909). A grant of "the sole right to produce petroleum, asphaltum and other hydrocarbon substances and natural gas" from a described tract of land, specifically granting for the term of ten years "the exclusive right to drill and operate oil and gas wells; lay and operate pipe lines; * * * the use of enough land on which to preserve the products, and erect such buildings as they may desire, etc.," does not vest in the so-called lessees any present title in the land. "It grants only the right to do certain things thereon and to take certain mineral substances therefrom, and no title to such substances passes from the original owner until the same is severed from the realty." *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732, quoted and followed.

"The right of possession is limited to the possession necessary to enable the lessees to search for the minerals they are allowed to take, until such minerals are found, and thereafter to the possession of only the part required for the convenient operation of the works they may construct and use for the extraction and removal of the minerals." The right to lay and operate pipe lines is not a general exclusive right, but is such only as will enable the lessees to carry out the main object of exploring for

and producing oil and gas. Subject to this right, which is paramount, the owner may make any use of the land which does not affect the search for or production of minerals. A pipe line having, with the owner's permission, been laid by a third party over a part of the land not occupied, used or operated by the lessees, the latter had no right to interfere with or remove it.

Colorado.

Florence Oil & Refining Co. v. Orman, 19 Colo. App. 79, 73 Pac. 628 (1903). A lease for oil and gas purposes for a term of twenty years, made in 1894, provided that two wells should be sunk within 18 months, and if they proved unproductive the lessee should pay \$50 a year until the drilling of new wells was commenced. By 1896 four wells had been sunk, but all of them were unproductive, and the lessee did no further work. In 1900 the lessor declared that the lease was forfeited. Held that, until oil or gas was found in paying quantities, the lessee had no vested estate in the oil or gas, but only an inchoate title, to preserve which it was necessary for him to prosecute diligent search for oil and gas after the 18 months had elapsed. The lessee failed to do this, and the lessor therefore had a right to declare the lease at an end.

Illinois.

Bruner v. Hicks, 230 Ill. 536, 82 N. E. 888, 120 Am. St. Rep. 332 (1907). A lease of homestead premises worth less than one thousand dollars, for the purpose of prospecting for oil and gas for the period of ten years, or so long as oil or gas might be found, is void if the lessors have not released their homestead in the manner provided by § 4, chap. 52, Rev. St. 1905, or voluntarily abandoned possession and accepted rent, with full knowledge of all the facts. "The lease in question was executed with the view to transfer a freehold interest in said premises, as it provided the term created thereby might last for an indefinite and undetermined period of time in case oil or gas was discovered upon said premises, and in that regard this lease is not like a lease for a term of years."

The value of the homestead premises is fixed as of the date of the lease, not as the date of discovery of oil or gas.

Watford Oil & Gas. Co. v. Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144 (1908). One of several tenants in common granted, demised and let the whole of the premises, for the purpose of drilling and operating for oil and gas, for one year and as long as oil or gas was produced in paying quantities. The consideration was one dollar, one-eighth of the oil produced, and \$200 per year for each productive gas well. The lease contained a provision for forfeiture unless a well should be commenced within 45 days or unless a stipulated payment was made for delay; and also that the lessee should have the right upon the payment of one dollar to surrender the lease, after which all payments and liabilities thereafter to accrue should cease and the lease become void. Held that the lessee had

no right to a compulsory partition either of the oil and gas, considered separately from the land, or of the land itself.

"A lease of land to enter and prospect for oil or gas is a grant of a privilege to enter and prospect, but does not give a title to the oil or gas until such products are found. In the eye of the law oil and natural gas are treated as minerals, but they possess certain peculiar attributes not common to other minerals which have a fixed and permanent situs. Owing to their liability of escape these minerals are not capable of distinct ownership in place. Oil and gas while in the earth, unlike solid minerals, cannot be the subject of a distinct ownership from the soil. A grant to the oil and gas passes nothing which can be the subject of an ejectment or other real action. It is a grant not of the oil which is in the ground, but to such part thereof as the grantee may find. The right to go upon the land and occupy it for the purpose of prospecting, if of unlimited duration, is a freehold interest, but such interest being vested for a specific purpose becomes extinct when the purpose is accomplished or the work is abandoned."

The option of the lessee to surrender deprives him of the right to specific performance, directly or indirectly, until he has performed the contract or placed himself in such position that he may be compelled to perform on his part. If the relief sought should be granted, the decree might at once be nullified by an exercise of the option not to proceed further. But while the power of revocation deprives the lessee of the remedy of specific performance, it does not avoid the contract.

Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46 (1908). P. in consideration of one dollar granted and leased to U. "all the oil and gas" under a tract of land for five years, and as much longer as oil or gas was found in paying quantities. The lessee agreed to drill a well within twelve months and, if gas were found, to pay a fixed sum per annum for each productive well, and if oil were found, one-eighth of the product. There was a provision for forfeiture for failure to drill a test well and also a provision that upon the payment of one dollar the lessee should have the right to surrender the lease for cancellation, after which all payments and liabilities thereafter to accrue should cease and the lease become void. A bill by P. to set aside the lease for want of mutuality was dismissed. It was argued that the provision for surrender made the lease a tenancy at will and also one-sided, harsh and unjust. "So far as the charge that the contract was harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract. There is no question of fraud and no charge or evidence of fraud in the case, and where parties who are competent in law and in fact to enter into contracts, freely and voluntarily contract with each other, it is of the utmost importance to them, and the public as well, that their agreement shall be respected and enforced by the courts and that neither shall be relieved from the obligation of his contract except upon some certain ground deemed valid in law." If the court could

have canceled the lease in any case, it could only be where nothing had been done under it, and that was not the case here.

Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N. E. 219, reversing 140 Ill. App. 147 (1908). A lease of unlimited duration, giving the lessee the right to enter upon land occupied as a homestead for the purpose of prospecting for oil and gas, drilling, operating and erecting the necessary buildings, pipe lines and other structures, is a conveyance of such an interest in the homestead as is void unless the lease is executed and acknowledged in the manner provided by § 4, chap. 52, Rev. St. 1905, but one seeking to avoid a lease on this ground must plead and prove the facts necessary to bring him within the statute.

Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696 (1908). The lease in this case was similar to that in *Poe v. Ulrey*. The lessee, having drilled a well, discontinued operations for a time, and the lessor made a lease to other parties who took possession and began operations. The first lessee filed a bill to enjoin the drilling for oil and gas. It was held that a suit to enjoin the violation of a contract was governed by the same rules as a suit for specific performance, and that the existence of the right of surrender created a lack of mutuality that deprived the lessee of the remedy of specific performance.

Gillespie v. Fulton Oil & Gas Co., 239 Ill. 326, 88 N. E. 192 (1909). A lease of oil and gas in certain premises for the term of five years, and as much longer as oil or gas is found in paying quantities, provided that if oil were found the lessor was to have one-eighth of the product, but that, in case no paying well was completed within five years, the lease was to be null and void. This passed no title to the premises, nor even to the oil or gas under them, but merely the right to go upon the premises and explore for oil or gas, and, if found, to produce them according to the letter of the lease.

Indiana.

Ohio Oil Co. v. Detamore, 165 Ind. 243, 73 N. E. 906 (1905). A lease, in consideration of \$120, conveyed all the oil and gas in and under a certain tract of land, with the right to enter and drill for same, the lessor to be paid a certain royalty on the product. In case no well was completed within six months, the lease was to be null and void, unless the lessee should pay to the lessor \$120 in advance for each six months thereafter that such completion was delayed. Held that the "lease" was merely a six-months' option with right of renewal, based upon a valid consideration, whereby the grantor bound himself not to lease the premises to another, and to give the grantee that length of time to determine whether the latter would undertake the development of the land on the terms stipulated. If the grantee had entered on the land and completed a well within the option period, the acceptance would have been complete and the grant effective. But by deciding in the negative that the prospect would not justify the expense, or by entering and drilling an unsuccessful well

and then abandoning the enterprise and removing belongings from the premises within the paid period, without renewal, the contract was exhausted by an exercise of the option not to develop. Therefore the drilling of a dry well, and then taking down and removing the machinery from the premises, accompanied by a failure to pay in advance for another six months, ended all contractual relations between the parties.

New American Oil & Min. Co. v. Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739 (1906). "The peculiar wandering character of gas and oil precludes ownership in their natural state, and hence they are not the subject of sale and conveyances until they have been reduced to possession and placed under control by being diverted from their natural paths into artificial receptacles. In such cases the real subject of the contract is the mining of the gas or oil that may be found, on the terms specified. The preliminary exploring is a mere incident and goes for nothing, if unsuccessful, and unless oil or gas is found in paying quantities, then there is and was not at the inception of the contract anything to which it could attach. So the title in such contract is at least inchoate until the result of the drilling is ascertained. And if barren territory is developed then there is no lease, no continuing contract, no conveyance of title, because there is nothing to pass under the agreement." Oil and gas leases are not within the provision of the statute concerning landlord and tenant.

Kansas.

Dickey v. Coffeyville Vitrified Brick & Tile Co., 69 Kan. 106, 76 Pac. 398 (1904). Gas and oil leases are in a class by themselves. They are not leases in the ordinary sense. They are in the nature of licenses with a conditional grant, conveying the grantors' interest in the gas or oil well, conditioned that gas or oil is found in paying quantities. When gas or oil is found, the right to produce it becomes a vested right, and the lessee will be protected in exercising it agreeably to the terms of the contract.

A stipulation in a gas or oil lease that "if wells are put in operation, and at any time in the future the party of the second part (the lessee) shall become satisfied that it is not paying, he shall surrender this lease, and remove all machinery, pipes and fixtures from the premises, and be released from all further obligations," does not put the lessee in the position of a tenant at will. The lease is not terminable at his option, after the production of gas or oil, on his assertion that a well is unprofitable, when the contrary is true.

Rawlings v. Armel, 70 Kan. 778, 79 Pac. 683 (1905). Where an oil and gas lease gives the lessee the exclusive right to enter upon the premises and operate for oil and gas, paying to the lessor a royalty on the product produced, no estate vests in the lessee unless oil or gas is found and produced. The preliminary right of exploration for gas and oil under such a lease is of such a character that it may be lost by abandonment without the lapse of time prescribed by the statute of limitations.

Pittsburgh Vitrified Pav. & Bldg. Brick Co. v. Bailey, 76 Kan. 42, 90 Pac. 803 (1907). In consideration of \$1 B. leased to the company described land

"for the purpose and with the whole and exclusive right of drilling and operating for oil and gas for a term of ten years and as much longer as gas or oil shall be found in paying quantities or rental paid thereon" for a royalty on oil and a fixed rental for each producing gas well. The lessee agreed to complete a well within two years or in default thereof to pay a yearly rental of twenty-five cents per acre for further delay until such well shall be completed. It was further provided that a failure to complete or make payment should render the lease void, and that the lessee should have the right at any time to surrender the lease.

"Written contracts of this character are commonly called oil and gas leases, but as was stated in *Dickey v. Coffeyville Vitrified Brick & Tile Co.*, 69 Kan. 106, 76 Pac. 398, 'they are not strictly leases as defined and treated in the law of landlord and tenant; they are in the nature of a written license, with a grant conveying the grantor's interest to the gas or oil well, conditioned that gas or oil be found in paying quantities.'"

"It is of the very essence of an option contract that one party has the choice of concluding or not concluding the proposed transaction, while the other party has no choice." "Under the conditions of the contract, as construed and acted upon by the parties thereto, the company paid one dollar and became obligated to pay \$40 per annum rental from the day of its execution until such time as it should complete a well or surrender the lease. It exercised its option by paying rent for two successive years and the lessors acquiesced in the part performance of the contract by accepting. The lessors will not therefore be heard to say, when the third year's rent is tendered, that the contract is unilateral and revocable by them because the company might have then exercised its option to surrender the lease."

A consideration of one dollar is valuable and adequate to support the lease (*Allegheny Oil Co. v. Snyder*, 106 Fed. 764, followed).

O'Neill v. Risinger, 77 Kan. 63, 93 Pac. 340 (1908). An oil and gas lease which provided that in case no well was drilled within six months "all rights and obligations secured under this contract shall cease and determine unless the second party shall elect to continue this lease in force as to all of said premises by paying an annual rental of \$1 per acre," but which contained no covenant requiring the lessee to drill a well or even to enter upon the lands and prospect for oil or gas, or to pay a rental for such privilege, is a mere option which lapsed upon the lessee's failure to drill or pay the rental. The lessor has no right of action to recover rental on such a lease.

Mills v. Hartz, 77 Kan. 218, 94 Pac. 142 (1908). A lease of land for oil, gas and coal gave the lessee the exclusive right to dig, etc., for twenty years and as long thereafter as the products be found in paying quantities, at a fixed royalty. No grounds of forfeiture were specified. After seven years of idleness by the lessee, the lessor sued to have the lease annulled. Held the lease is not a grant of land, nor of the oil, gas or coal in the land. It did not transfer any estate to the lessee; the lessor granted him the possession of the land with the right to search for minerals and gave him

an interest in so much of the minerals as might be found and taken out, but if none were found no interest in the undiscovered mineral could be acquired by him and certainly no estate in the land.

Beardsley v. Kansas Natural Gas Co., 78 Kan. 571, 96 Pac. 859 (1908). An ordinary oil and gas lease by which the lessor grants, demises, leases and lets to the lessee a described tract of land for the sole and only purpose of mining and operating for oil and gas for the term of ten years, and as long as oil or gas is procured by the lessee, does not convey an interest in the real estate or any present title to the oil or gas which may be in the leased premises. It passes merely the right of exploring for those minerals and the right to sever them if found.

Kentucky.

Young v. McIlhenny, 116 S. W. 728 (1909). In an oil or gas lease no time or term was fixed for the lease to run and no consideration whatever was provided for the lessor other than an interest in the production when oil was found in paying quantities, and so much per year when gas was found. The lessee was not required to drill within any designated time, but there was a provision: "If no well is commenced on the premises hereby leased within one year from this date, then this grant shall become null and void, unless the party of the second part shall pay to first party \$75 for each year thereafter such commencement is delayed." The lease was held to be simply an option given by the lessor to the lessee for one year with the right to renew the option at the end of the year upon the payment of \$75 if the lessee had not commenced operations thereunder within the twelve months. There being nothing in the lease binding the lessee to do anything on which the lessor might sue for specific performance, it was void for want of mutuality.

Louisiana.

Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 So. 481 (1907). The lessees of an oil and gas lease agreed to sink a well within a fixed time or pay a fixed rental quarterly in advance so long as the work was delayed; one of the rentals being tendered after it was due was refused. Held (1) Since the sole and only object of the lease was the exploiting of the land for oil and gas, which the contract left it to the lessee to do or not to do, in reality there was no contract binding on him. (2) But if there be a contract it is either (a) an option to lessee to drill within a certain time, which time he might extend by quarterly payments in advance, or (b) a commutated contract, the obligation being to exploit for oil and gas. If the former, it terminated by failure to pay the agreed rental on time; if the latter, it terminated by failure to drill or offer to do so. (3) Assuming lessee's obligation to be alternative, drill or pay rental, when the alternative right of paying rental ceased by delaying until after it becomes due, the contract became pure and simple, performance of which by lessee meant "develop the land for oil and gas." (4) An option must be exercised within the time agreed, else it is lost.

This ruling seems to go one step beyond *Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate*, 115 La. 107, 38 So. 932 (1905), where the court held such contract not to be ipso facto void for want of mutuality, etc. Here, however, we have a ruling on the effect of lessee's failure to comply strictly with its terms.

New York.

Conkling v. Krandusky, 127 App. Div. 761, 112 N. Y. Supp. 13 (1908). In 1893 A. executed to B. an oil lease for fifteen years "or so long as oil is found in paying quantities," the lease to be null and void unless B. commenced drilling within three months. B. drilled but found no oil, and in 1894, no oil having been discovered, took away his derrick and machinery, leaving only the casing, and did nothing further for eleven years. In 1905 he entered, put down a well and found oil. Eight months prior, however, A's widow had executed a new lease for five years to C. Held oil leases and contracts stand on an entirely different basis from any other leasehold agreements. The work to be done is ordinarily experimental and speculative. If oil is not found no estate vests in the lessee. While ordinarily forfeiture or abandonment is not looked upon with favor, that rule is not applicable to these oil leases. When B. took away his machinery, these acts on his part indicated that he had abandoned the project, and this is especially true when the work was not resumed again for eleven years. The granting of the lease to C. was a declaration on the part of A. that she regarded this outstanding lease as terminated. Time being the controlling factor in oil leases, an agreement to begin work within a fixed time or pay rental in lieu thereof will be strictly enforced, and abandonment declared where the lessee neither works nor pays rent.

Pennsylvania.

Calhoon v. Neely, 201 Pa. 97, 50 Atl. 967 (1902). See this case on page 238, below.

Wilson v. Philadelphia Co., 210 Pa. 484, 60 Atl. 149 (1904). See this case on page 200, below.

Texas.

National Oil & Pipe Line Co. v. Teel, 95 Tex. 586, 68 S. W. 979, affirming 67 S. W. 545 (1902). Where an instrument grants all the oil and gas under certain premises with the right to enter and drill for the same, reserving as a royalty a part of the oil produced and saved from the premises, and there is a further provision that in case operations for drilling a well are not begun and prosecuted with due diligence within two years the grant should become null and void, unless the grantees paid \$100 per year until a well is completed, in which case they could thus delay such forfeiture from year to year, such instrument is objectionable for want of mutuality, because of the absence of any right in the vendors to

insist on performance. Until acted upon this instrument was an option or in the nature of an option. The real consideration of such a grant "was not the recited \$1, nor the \$100 that after the two years might be paid in order that they might keep it going from year to year, but the beginning and prosecuting with due diligence of wells for oil or minerals upon the land; in other words, the development of the property for oils and minerals in the near future. * * * According to the terms of the contract, it is left optional when this consideration is to be performed, if ever." Therefore, until the grantees have started work no equities exist in their favor, and the grantor has the right to annul the contract. The grantees were not bound to perform, and could abandon the matter at any time, and under these circumstances the grantor was also not bound.

Emery v. League, 31 Tex. Civ. App. 474, 72 S. W. 603 (1903). The owners of an undivided interest in oil lands granted and leased the same for the sole purpose of prospecting for oil and minerals, with the exclusive right of developing all mines and wells dug or built on the premises by the lessee, a certain part of the oil to be returned to the lessors as royalty. The lessee was to begin operations within six months after partition proceedings setting apart in severalty the interest of the owners in the oil lands, which partition proceedings were, by subsequent agreement, to be instituted by and conducted at the expense of the lessee. The lessee had the right to cease operations under the contract whenever it became manifest that it would be unprofitable not to do so. Held that the instrument was not an absolute conveyance of the minerals underlying the demised premises, but in the nature of an option, which could ripen into a title only by compliance by the grantee with the terms of the agreement, and the accomplishment of the purpose for which it was executed, viz., the development of the oil lands. "The grantee under such instrument, so long as he continued diligently to comply with his agreement to prospect and explore the land for minerals, could not be deprived of his right to acquire title to such minerals by their discovery and development, but no title in such minerals would vest until their discovery, and unless such grantee begins the performance of his part of the contract within a reasonable time, the grantor can consider the contract abandoned." Unless, therefore, the grantee began within a reasonable time after the execution of the contract to perform his part of same by making a reasonable endeavor to secure a partition of the land, the grantors in said contract could treat the same as abandoned by the grantee, and decline to recognize any further rights in him thereunder.

"A different rule is applied to contracts of this character from that applied to ordinary leases, and the decisions uniformly hold that contracts in which land is leased for the purpose of being prospected and developed for oil are to be construed most favorably to the lessor. * * * In order to preserve his rights under a contract of this kind, the lessee must begin within a reasonable time the performance of his part of such contract and continue in the performance of the same with reasonable diligence."

Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105 (1903). Where the consideration for an oil lease is \$1, which is not in fact paid, and the only consideration, so far as the lessee is concerned, is the promise to develop the leased premises and to deliver to the lessor a percentage of the gross oil product, and the lessee can terminate the lease at any time without any further compensation to the lessor, such a lease is a unilateral contract. The lessor may annul such a contract at any time before performance begun, and a conveyance of the premises by the lessor prior to the beginning of operations by the lessee is an annulment of such lease.

Hodges v. Brice, 32 Tex. Civ. App. 358, 74 S. W. 590 (1903). Where an oil lease is made for a nominal consideration, the lessee to begin operations within a certain time or else pay a small consideration from month to month until he does so, the lessor to get a royalty on the oil produced from the premises and the lessee to have the right to terminate the lease at any time without further liability on his part, and the lessee never commences any operations on the demised land, the lease is void. At most it is a mere option for a lease, which is concluded by the foreclosure of a judgment lien against the land.

Great Western Oil Co. v. Carpenter, 43 Tex. Civ. App. 229, 95 S. W. 57 (1906). The consideration of \$1, recited as paid and in fact paid in an oil and gas lease, is merely nominal, and the contract must be supported by other consideration.

An oil and gas lease is unenforcible if it is unilateral, placing no obligation on one of the parties thereto.

A contract which binds the lessee unconditionally, and not at his option, to do specified work under a specified time upon the leased premises, has been held not to be a unilateral contract, unenforcible for want of consideration. It is no answer that the lessee cannot be compelled specifically to do the work agreed to be done by him, and that the remedy by way of a suit for damages for failure must prove inadequate because there are no means by which his damages can be measured. Lessors cannot be heard to complain of these contracts, deliberately and understandingly entered into, on the ground that the obligation which they have exacted of lessees as consideration for their own contract is of such nature that it is difficult, if not impossible, to determine the amount of their damages, in case of a violation of this agreement by lessees.

A lease binding lessee to sink one or more wells within eighteen months, and to commence work within six months, allowing the lessee no option in the matter, is valid and enforcible; it is not rendered otherwise by the inclusion of a clause reserving the right to lessor to terminate the lease upon default by lessee.

Virginia.

Richlands Oil Co. v. Morris, 108 Va. 288, 61 S. E. 762 (1908). A. and B. "had obtained leases upon certain lands in Kentucky which gave them the

privilege of prospecting for oil and gas. The consideration stated in these leases was one dollar in hand paid," and the lessees thereby acquired the exclusive right to enter upon the leased lands to drill for oil, gas or water, and to erect, maintain and remove all structures, pipe lines and machinery necessary for the production and storage of oil, gas and water. It was provided that if oil should be found in paying quantities upon the premises, the lessees should deliver to the lessor, in the pipe line with which its wells may connect, one-eighth part of all the oil produced and saved from the premises; that if gas only were found, the lessees agreed to pay \$50 each year for the product of each well while the same was being operated; and that if no wells were completed within twelve months from the date of the lease, the grant should become null and void, unless the lessees then paid to the lessor for the land ten cents per acre for each year. Such a lease, it seems, vests no present estate in the land until the oil is found. It confers merely the right of exploration, the title to the land remaining inchoate and contingent on the finding of oil or gas in paying quantities under the exploration provided for in such lease.

West Virginia.

State v. South Penn Oil Co., 42 W. Va. 80, 24 S. E. 688 (1896). By the terms of the lease the lessor "hath granted, demised and let unto" the lessee "the exclusive right to mine, bore, excavate and produce petroleum, rock or carbon oil and gas etc.," from a described tract "to have and to hold the said premises, for said aforesaid purposes only, for, during and until * * * ten years * * * or as long as oil and gas may be found in paying quantities." The consideration was a royalty of one-eighth the product. There was a covenant to commence operations etc., and also that lessor might use the premises for tillage purposes except such parts as should be necessary for mining.

It was held that the interest of the lessee should not be assessed as real estate separate from the surface under the statute of West Virginia, which provided inter alia "when mineral, mineral water, oil, gas or coal privileges or interests are held by a party, etc., exclusive of the surface, the same shall be assessed separately to such party, etc."

"The appellant contends that by these leases, it appears that the oil company is but a tenant for years, and is not the owner of a freehold in fee or for life; that they do not work a separation in ownership for any freehold interest of the mineral oil in situ from the surface—the land as one corpus; that the corpus of the oil does not belong to the lessee, and the surface to the lessor; that there is therefore no divided ownership; and that there being no divided ownership, so, within the meaning of the act, there can be no separate listing and assessment."

"By the leases here in question, the owner does not agree to part with any part of his ownership in the oil in situ, or in any part of the thing or corpus to which his ownership applies, but contracts, by words of grant or demise, that the lessee shall have the exclusive right to mine, etc. * *

* The right of the lessee or grantee under its provisions was to explore for and determine the existence of oil or gas under the lands. If none was found, the rights of the grantee ceased when the exploration was finished. If oil or gas was found in paying quantities, then the contract took effect as an oil lease, and the lessee has a right, under a contract obligation, to operate the land for the production of oil during the time and upon the terms fixed in the lease. See *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732. The privilege or right to hunt or explore for oil does not profess to be in fee or for life, and vests nothing but the right, for a limited period, to work the land for oil. By it, the parties acquired no estate, either in land or minerals. If they had found oil, they were to have seven-eighths of that which they brought to the surface or produced, but as to property or ownership in oil in situ they had none. Nor does the addition to the term of years of the clause and as long as oil or gas may be found in paying quantities, give it such indefinite duration as makes the interest freehold in quantity, for, after the expiration of the term prescribed (ten years), the lessee, having the option to continue to pump if he can find oil in paying quantities, becomes a tenant at will, which may become a tenancy from year to year on the terms of the lease, but is not a freehold, because its extension after the end of the term prescribed depends upon his own act, the exercise of his own will; so according to the terms of the instrument, that is as large an interest as the words will bear. Such superadded possibility of extended duration constitutes no part of the term of years prescribed, but is a new interest, in the nature of an option to become tenant at will or from year to year, by the exercise of his own volition when the fixed term of years shall have expired. He has but a contract with the owner of the land for the possession. He is not seised of any part of the ownership of the land by any title. This lease, so far as the seisin of the ownership of any strata or part of the corpus of the land is concerned, neither creates nor transfers such ownership, or any part thereof, which cannot be created or transferred in less quantity than that of a freehold."

Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107 (1898). M. leased to G. for oil and gas purposes for five years for one-eighth of the oil produced and \$200 per annum per well producing gas. The lease provided: "In case no well shall be completed * * * within one month from the date hereof, this lease shall become null and void, and without any further effect whatever, unless the lessee shall pay for further delay at the rate of fifty dollars per month * * * until a well shall be completed." G. put down a test well, but finding neither oil nor gas in paying quantities, he removed his machinery, plugged the hole and left the premises. He made three monthly payments, and then asked permission of M. to hold the lease for a short time. After a few months M. repeatedly notified G. to surrender the lease as she wished to lease the land to others. She finally leased to S., who filed a bill to cancel the lease to G. as a cloud on his title. Held he was entitled to this relief.

"The G. lease is, with slight variance, in the usual form of such leases, and amounts to nothing more than the privilege of searching for oil and gas, and if they be found in paying quantities, then vests an oil and gas tenancy in the lessee for the period of five years or until exhaustion. Mrs. M. entered into the lease for the sole consideration of the prospective rents and royalties she would enjoy if the lessee, in diligent search therefor, should find oil and gas in paying quantities. If such lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and voidable, if not void, at the pleasure of either." The only provision binding the lessee to operate is quoted above. "There is no provision made for any further operations or payment of rent in case the first well, when completed, is non-productive. But the contract is at an end as to both parties as soon as such first well is abandoned as unsuccessful." (*Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732, quoted and followed.)

The same conclusion is reached if the lease is held to be subject to an implied condition that the lessee should diligently prosecute the search and operation.

"However, as before shown, the lessee having abandoned the only obligatory search provided for in his lease, it died on his hands without surrender, forfeiture or intentional abandonment on his part, for he was without authority to make further explorations without the consent of, and arrangement as to conditions with, the lessor; in other words, without a new lease or extension of the old. * * * When a lease provides the mode, manner and character of search to be made, implications in regard thereto are excluded thereby as repugnant. And the demise for the purpose of operating for oil or gas for the period of five years is dependent on the discovery of oil and gas in the search provided for, and, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise."

The putting down an unproductive well did not vest any right in the lessee, nor could he charge the expense thereof as a part of the consideration of the lease.

Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84, 34 S. E. 923 (1899). An executory gas and oil lease, with covenants to drill within a certain time or pay rental, which provides that the lessee shall have the right to surrender it and be relieved from all moneys due and conditions unfulfilled, creates a mere right of entry at will, which may be terminated by the lessor at any time before it is executed by the lessee. The execution of a new lease to other lessees, and possession thereunder, render such prior executory lease invalid.

Trees v. Eclipse Oil Co., 47 W. Va. 107, 34 S. E. 933 (1899). An executory oil and gas lease, which does not bind the lessees to carry out its covenants, but reserves to them the right to defeat the same at any time, and relieve themselves from the payment of any consideration therefor, is invalid to create any estate other than the mere optional right of entry, which is subject to termination at the will of either party. Such executory

lease is terminated by the death of the lessor.

A person holding a valid executory oil and gas lease, executed by several of a number of cotenants, has such an inchoate interest in the land subject to such lease as will enable him to maintain an injunction to prevent a wrongdoer from committing waste by the extraction of such oil and gas.

Harness v. Eastern Oil Co., 49 W. Va. 232, 38 S. E. 662 (1901). An oil and gas lease provided that "in consideration of the sum of \$1,250, the receipt of which is hereby acknowledged, * * * parties of the first part do hereby grant unto * * * second party, his heirs and assigns, all the oil and gas in and under the following premises," describing them, with the right to enter and drill and operate for oil, gas, etc., reserving to themselves one-eighth of the oil produced, to be run into pipe line to their credit. "Term of lease two years, and as much longer as oil or gas is found in paying quantities. If gas only is found, second party agrees to pay \$250 each year, quarterly in advance, for the product of each well while the same is being used off the premises. Gas free for dwelling-house purposes." The production in paying quantities of either gas or oil, and the payment of gas rental or the delivery of one-eighth of the oil as royalty in the pipe line, as stipulated, will perpetuate the lease during the time of such production. The right to avoid such a lease for want of mutuality because of the clause giving the lessee the right to surrender it at any time (*Eclipse Oil Co. v. South Penn Oil Co.*, above) only exists until the lessee begins work under it in good faith. He then has a vested estate.

Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566 (1902). An agreement whereby certain lands, in consideration of \$50, are granted, demised, leased, and let for the sole and only purpose of boring, mining and operating for oil and gas, and laying pipes and building tanks, stations and houses thereon to take care of the products, for the period of 15 years, and providing that the lessee shall complete one well on the premises within one year from its date, or pay the lessor a rental of fifty cents an acre for each year the lease may remain in full force after the first year, immediately after which provision the following stipulations are written: "But it is agreed and understood that the fifty dollars, paid in cash, is to pay all rentals on this lease for the period of one year from the date hereof. It is further agreed that when the first well is completed on said premises, then all cash rentals shall cease," does not bind the lessee to do anything further after completing one well on the premises, and upon his abandonment of further operations upon the premises for more than 18 months, leaving the well unprotected, so that it caved in and partially filled up, the lessor, after waiting a year or more from the date of abandonment, had the right to lease the land to another.

The principal purpose and design of the parties to such a lease, clearly discernible from its terms, being the production and marketing of the oil and gas in the land for their mutual benefit, mere discovery of oil by exploration under it vests no title to it in the lessee, but it does vest in him

the right to produce and take the same in accordance with the terms and conditions of the contract. In such right the lessee will be protected, but he must proceed to exercise it with reasonable promptness and diligence.

Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101 (1903). Where a grant of oil and gas, and oil and gas privileges, in consideration of \$1, without limitation as to time, contains a forfeiture clause in these words: "In case no well is completed within two years from this date, then this grant shall immediately become null and void as to both parties; provided, that second party may prevent such forfeiture from year to year by paying to the first annually in advance \$18.75, at her residence, until such well is completed," such lease is thereby converted into a lease from year to year, at the option of the lessee, until a well is completed. It would then continue so long as oil or gas is produced in paying quantities. "This lease is very different from the one passed on in the case of *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923. While one dollar is a small consideration, yet it is a valuable consideration and the court cannot say that it was inadequate under the circumstances, as the lessor did not consider it so. It was only intended to hold the grant for two years and after that time a further consideration to prevent forfeiture was provided. During the two years the lessor did not object to the inadequacy of the consideration, and it is too late to do so now."

Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027 (1903). A lease of land for oil and gas purposes for a term of three years, or as much longer as oil and gas can be found in paying quantities, contained no provision for rental or forfeiture, but provided for a royalty of oil produced and an annual payment for each gas well. It gave the lessee the right to remove machinery, and to "at any time surrender this lease and be relieved from all liability thereunder." Such a lease does not create immediately a vested estate. "But when once the lessee under even such a lease begins work, while he has no vested estate, still he has a right to go on in search of oil, and the lessor cannot then at mere will destroy his right. An ordinary oil lease, making the lessee pay a consideration, binding him to some obligation, vests only inchoate right, that is right to explore for oil, but no actual other estate than right to develop, and if he gets no oil, he still has no vested estate; but if he does get oil, he has a vested estate. Such a lease calls for the right, not to oil in place, but to extract it. * * * Just so with the lessee under a lease without rental or obligation after he has begun or after he has obtained oil. When he has obtained oil, he has a vested interest according to the lease."

That interest when vested may be lost by abandonment. To constitute this there must be both an intention to abandon and actual relinquishment of the leased premises. An abandonment was found when the lessee after drilling two wells, one of which produced oil but not in large quantities, discontinued work, removed machinery, did nothing for a year, and gave plain sign of no intent to go on.

Kilcoyne v. Southern Oil Co., 61 W. Va. 538, 56 S. E. 888 (1907). The owner of a tract of ground conveyed to C. one-sixteenth of all the oil and gas within or underlying it. He then leased the tract for the production of oil and gas to J. in consideration of a royalty of one-eighth of the oil produced and \$300 per annum for each gas well. Thereafter he granted to S. one-sixteenth of all the oil and gas within and underlying the tract and one-half of the gas royalties, and then conveyed to K. all his right, title and interest in the oil and gas in the land. It was held that J., as lessee, was liable to account altogether for only one-eighth of the oil produced; the other seven-eighths belonged to him under the terms of his lease. Of the one-eighth for which he was bound to account, one-sixteenth belonged to C. and one-sixteenth to S. and nothing passed to K. by his deed.

"It is true that the ordinary oil and gas lease, giving the lessee for a term of years the right to mine and operate for oil and gas, is not a sale of the oil and gas in place, and the lessee has no vested estate therein until produced, but when found, the right to produce becomes a vested right, and when extracted, the title vests in the lessee, and the consideration or royalty paid for the privilege of search or production is rent for the leased premises. While this is so it will not do to say that the covenant of warranty in the lease is limited to the right to search, and that when oil is once found the right to produce is not likewise protected by the warranty." The object of the lease was the right to search and the right to produce when found, "And if the right to produce when found is warranted, it must be to produce the entire amount stipulated for in the lease, and wherever the lessee's right to so produce is defeated there is a breach of the covenant of warranty and the lessor is liable."

Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762 (1909). The instrument in this case, in consideration of fifty-five dollars, leased the land for five years and so long as oil or gas should be found in paying quantities. It contained a provision for forfeiture, but no covenant on the part of the lessee either to drill wells or to pay rent. This lease was not void for want of mutuality. It differs from *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84, 34 S. E. 923, above, in which case there was no consideration paid. Where a consideration is paid there is a vested right of exploration. An option given for a valuable consideration cannot be revoked until the time limit has expired. An option given without consideration may be revoked at any time before its acceptance by the other party.

Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 S. E. 836 (1909). The discovery of oil or gas under a lease giving right of exploration and production, unless there is something in the lease to the contrary, is sufficient to create a vested estate in the lessee in the exclusive right to produce oil or gas, a right which, however, may be lost by abandonment, by failure to produce, or pursue the work of production or development.

Such right, once vested by discovery of oil or gas in an upper sand, will not be lost if the lessee continues to drill deeper in search of oil or gas in a lower sand, although he does not succeed in the latter effort within the

period limited by the lease, but if that be the case, production from the upper sand may not be deferred long without incurring the penalty of abandonment or forfeiture, if forfeiture be prescribed.

Where the lease is for a fixed term with the right of extension if oil be produced within the term, the date of the lease is to be excluded from computations unless otherwise provided.

In West Virginia, such leases are licenses vesting no estate until oil or gas is found.

B. and C. Incorporeal Rights and Licenses Relating to the Extraction of Oil and Gas.

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Illinois.

Cortelyou v. Barnsdall, 236 Ill. 138, 86 N. E. 200 (1908). An oil and gas lease gave lessee the right to mine for oil and gas as long as they are produced, and royalties and rentals paid; lessee, however, was not obligated to do anything. Held, such a lease is a mere license revocable by lessor before anything done by lessee. Lessee having paid no consideration, and not being obligated himself to perform anything, lessor's notice of revocation before anything done by lessee amounts to a withdrawal of an unaccepted offer.

Indiana.

Heller v. Dailey, 28 Ind. App. 555, 63 N. E. 490 (1902). The question in this case was whether a certain oil and gas lease constituted the conveyance of an interest in land within the meaning of the statute of frauds. The court says on this point: "In cases involving contracts relating to the finding and taking of oil and gas from land, it is not always easy to state or to apply legal definitions. We must seek for practical results, not inconsistent with the principles of law relating to analogous matters, but maintaining, so far as may be, the rights of parties to contract with reference to their own property. By the terms of this contract the landowner 'grants' to Dailey and Eddington 'all the oil and gas in and under' the land, with the right to enter upon the land at all times for the purpose of drilling and operating for oil or gas, and to erect and maintain all buildings and structures and to lay all pipes necessary for the production and transportation of the oil or gas taken from the land, excepting and reserving a certain portion of the oil produced. No other interest in the land is transferred, the right of the landowner to cultivate the soil being recognized. The contract is not in the form of a lease of the land, or any portion of it, for years or for life or in perpetuity, with an accompanying right, as an incident of the letting, of taking the oil and gas beneath the surface. * * * The grant is not limited to any period of time, though, as in the case of a grant of the coal in certain land, it would cease to be operative whenever it should be found that no oil or gas was beneath

the soil, or none that could be taken with benefit; whereas a lease of land, properly so called, would continue in force according to its provisions until the end of the term. The contract is in effect a grant of the right to take all the oil and gas that may be found and taken by making wells as prescribed upon the particular tract of the land, with accompanying incidental rights to do, as indicated in the contract, upon the surface those things needed for the enjoyment of the principal right to so take oil and gas. It confers rights not limited as to time, unless it be as to the indefinite period within which oil or gas may be taken advantageously under the conditions prescribed. The right to take all the oil and gas in and under the land is in its nature an exclusive right. It is inconsistent with a right in the grantor or others under him to take any of the oil or gas from beneath the designated land, at least through wells drilled upon that land. The oil and gas in their free and natural state within the land constitute a part of it though they may be fluent and liable to depart to other land, there to be taken into possession through the wells made for such purpose. The right to take such minerals from the land constitutes an interest in the land. The instrument under consideration does not create a mere personal privilege to take the minerals from the land. It is an exclusive and assignable interest in land. If with propriety it can be called a license, it must be a license coupled with an interest in land. By its terms the contract is a grant of the minerals in and under the land. If by such general terms all of a specified solid mineral, as coal, in and under the land were granted, it would be a grant of real estate (*Plummer v. Hillside Coal & Iron Co.*, 160 Pa. 483, 28 Atl. 853); but, because of the fluidity and fugitiveness of petroleum and natural gas, the absolute ownership of these mineral substances within the land cannot be acquired without reducing them to actual control, so that a distinction must be and is made between these elusive minerals in and under the ground and the solid minerals in place in the earth. Therefore, a grant of all the oil and gas in and under a tract of land is not a grant of any particular specific substance, as would be a grant of the coal in and under certain land. The owner of land is not, by virtue of his proprietorship thereof, the absolute owner of the oil and gas in and under it in its free and natural state, not yet reduced to actual control of any person, but he, together with the other owners of land in the gas field, has a qualified ownership, consisting of or amounting to his exclusive right to do what may be done on, through and under his land (as making of wells) necessary to reduce the minerals to his possession, and, by thus acquiring the exclusive control, to become the owner of the mineral substances as his personal property, observing due regard in his operations to the like enjoyment of such exclusive right by all other landowners in like circumstances. This exclusive right is his private property. He cannot grant more than he owns; therefore, by granting all the oil and gas in and under his land, he does not grant more than a right to reduce to ownership the oil and gas which may be obtained by operating on the land, whereby substances which, at the time of the making of the grant, may be in and under lands of other sur-

face proprietors, may come into rightful ownership of the grantee as his personal property. Though, because of the peculiar nature of oil and gas, a corporeal interest in them in place cannot be created, and title to the specific mineral substances cannot be acquired without the reduction of them first to personal property, yet the exclusive and assignable right to do this, with the accompanying rights necessary to such accomplishment, constitutes, not a privilege revocable before it has been acted upon, but a subsisting, exclusive, assignable and irrevocable right, which accrues upon the execution of the written instrument of conveyance and before any action has been taken thereunder. The right so created is not susceptible of livery of seisin, and is in the nature of an incorporeal hereditament. See *Funk v. Haldeman*, 53 Pa. 229. The contract before us can not be regarded as a lease of land for three years or less, or as a lease of land ineffectual because of uncertainty or indefiniteness of duration of term, and occupancy thereunder cannot be regarded as a tenancy from year to year; but the interest granted is properly to be considered as an interest in land within the meaning of our statutes."

Kansas.

Kansas Natural Gas Co. v. Board of County Com'rs of Neosho County, 75 Kan. 335, 89 Pac. 750 (1907). An oil and gas lease conferring upon lessee the right to "enter upon, operate for and procure oil and gas" upon land described, and containing no provisions indicating otherwise, grants a license to enter and explore, and, if oil or gas is found, the right to produce and sever it. Until such mineral is actually produced and severed so that it becomes personalty, lessee has no title to any specific portion of it, but the legal title to, and the possession of, the entire mass and volume, remain in the owner of the strata in which it is confined.

Eastern Ohio Oil Co. v. McEvoy, 75 Kan. 515, 89 Pac. 1048 (1907). An ordinary oil and gas lease, giving the right to drill on the land for oil and gas creates a mere license. The lease grants no estate in the land, but creates only an incorporeal hereditament and license to enter and explore. The interest of such a lessee will not support a mechanic's lien under the Kansas statute.

Louisiana.

Martel v. Jennings-Heywood Oil Syndicate, 114 La. 351, 38 So. 253 (1905). Where A. and B., owning adjoining tracts of land, joined in a lease of the same to C. for the term of 99 years, for the purpose of prospecting, boring, excavating, etc., for oil, gas, petroleum, coal, salt, sulphur, and other minerals, during that period for the consideration of \$1 and one cent for each barrel of oil sold, and the same proportionate value for all other minerals, A. to have one-third of the royalty accruing from the land of B., and vice versa, and where C. did not bind or obligate himself to prospect or to do any work on the premises, held that such an agreement is not a contract of lease, but a mere permit or license, revocable and terminable at will.

Where, within 30 days thereafter, B. leased his tract of land to C. for one year, and on different terms and conditions, the lessee binding himself to develop the property for oil and other minerals, and the royalty, fixed at one-eighth of the oil, was made payable to B. alone, held that the first lease was abandoned and terminated, and was no longer binding on A.

Where, after subsequent discovery of oil on the B. tract, C. entered on the land of A. for the purpose of erecting a derrick thereon, and was enjoined by A., who soon thereafter sold a fifth interest in the land to plaintiffs, held that they acquired a title free of the first lease, and were not effected by the subsequent compromise of the suit and the recognition by A. of the first lease in a modified form.

New York.

Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584 (1902), affirming 41 App. Div. 126, 58 N. Y. Supp. 526 (1899). A. owned an oil lease, whereby certain land was granted, demised and let for the sole and only purpose of mining and excavating for oil for 40 years, the lessee to render to the lessor one-eighth of the oil produced. He died and his executors and devisees conveyed to plaintiffs certain lands in the town of C., in which the lands covered by the oil lease were also situated. The deed to the plaintiffs provided: "It is the intent hereof to convey to the parties of the second part all the lands and premises owned by the parties of the first part, or in which they have an interest lying or being in the said town of C., whether the same are hereinbefore particularly described or not." Held this deed did not convey the oil lease. No title passed by the lease to the oil in its natural state in the earth, none vested until it was taken from the ground and reduced to possession. Again, by chapter 372, of the laws of 1883, the legislature enacted that "all oil wells and all fixtures connected therewith, situate on lands leased for oil purposes, and oil interests and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation." Although this act passed after the date of the lease, it was in force at the date of the deed, and the grantors must be presumed to have had the statute in mind.

The appellate division of the supreme court in discussing the nature of the lease said: "While the oil remained in the ground, the so-called lessees possessed an intangible property right therein. Their contract was in the nature of a license, until consummated by the extraction and separation of the oil. The vendees' right, however, under their lease, is difficult to define. It partakes of the characteristics of an incorporeal hereditament, except the definiteness of its tenure prevents it being technically within that term. * * * The instrument by which the plaintiffs acquired title was a deed conveying real estate and the hereditaments inseparably connected therewith. * * * The fee of these lands was not" in A's devisees. "They, at best, merely possessed the privilege to go upon the land and extract the oil. This was a mere incorporeal right, and of the nature of personal property."

Pennsylvania.

Hicks v. American Natural Gas Co., 207 Pa. 570, 57 Atl. 55, 65 L. R. A. 209 (1904). A. granted to the defendant all the oil and gas under a certain farm with rights of ingress and egress, to drill and operate and to erect buildings and machinery. Defendant entered upon the premises and sunk wells, but did not record his lease. A. subsequently conveyed the farm to plaintiff, without any reservation of the oil and gas. Plaintiff recorded his deed, and filed a bill in equity to restrain defendant from interfering with his ownership and to annul the lease. Held that he had an adequate remedy at law.

"It is further argued by appellant that this court is without jurisdiction because this is what is known as an ejectment bill, an attempt to oust defendant from possession of land by a suit in equity while the remedy is at law by ejectment. To this appellee replies, in a supplemental paper-book, citing a number of our own decisions to the effect, that an oil or gas contract or lease is an incorporeal hereditament, that is, 'A right issuing out of a thing corporate, or concerning, or annexed to or exercisable within the same. It is no part of the corporate thing; that remains as perfect after the right has issued or has been exercised as before.'

"Undoubtedly, several of our cases hold that an oil or gas contract in the usual form is an incorporeal hereditament, and ejectment cannot be maintained thereon. But whether it is the subject of ejectment by him who has the title of the corporate thing, after the right has issued out of the thing corporate, depends on the special situation of the incorporeal hereditament in the particular case at the date of the suit; if, to enjoy the right or exercise it, an actual though qualified or restricted possession has been taken, then the owner of the thing corporate, who denies the existence of the right, or alleges it to have been lost or forfeited, can maintain ejectment against him who has the restricted possession under the incorporeal hereditament. We will not say that ejectment would in all cases be the only remedy of the owner, for there might be rare cases where equity would take jurisdiction, but we do say, unhesitatingly, that in the case before us, ejectment was his only appropriate remedy.

"And the cases cited by counsel for appellee in their supplemental paper-book in no wise antagonize but support this view. *Funk v. Halderman*, 53 Pa. 229, is the first and leading case cited. In that case Funk filed his bill to restrain defendants from trespassing on land leased exclusively to him for oil purposes by McElheny the owner; the defendants alleged that Funk, the first lessee, had forfeited his right and, that at all events his right was not exclusive. The court below held that Funk had forfeited his right and granted an injunction. He appealed to this court, which in an elaborate opinion by Woodward, C. J., reversed the decree and awarded an injunction, holding, that Funk had not violated his covenants whereby a forfeiture had been incurred, and that if he had 'A chancellor would be likely to send the grantors into a court of law to enforce the forfeiture by ejectment, for equity does not ordinarily enforce forfeiture.' It will be noticed that this case was not between the oil lessee

and the owner, but between two rival claimants of the oil, yet it is more than intimated that if Funk had forfeited his lease, and the defendants under their contract had succeeded to his right, then, they would have stood in the shoes of the owner and Funk being in possession, ejectment would have been their remedy. This is the first case in this state in which the nature of the estate acquired by a lease of the exclusive right to search and drill for oil was passed upon by this court. And although it is, somewhat reluctantly, held to be an incorporeal hereditament, yet it is in substance decided that if the suit had been between the owner of the land and Funk, the owner of the incorporeal hereditament or license, the owner's remedy to oust Funk would have been by ejectment. This case was decided in 1866, a very few years after the great utility of natural oil and its immense value as an article of commerce had been demonstrated; its extent under the earth, the means of discovery and methods of production were still but imperfectly known. It may be doubted whether now, after forty years more of knowledge, if the question were first before us, we would hold that a grant of exclusive right to the oil under a defined tract of land, coupled with the exclusive right to portions of the surface for production and transportation, is an incorporeal hereditament. But in *Funk v. Haldeman* we did so classify it, and have followed that decision in many cases since. Having due regard, therefore, to the rule of stare decisis we must continue to so classify such contracts."

"We have found no case, and none has been cited, which holds that the remedy of the owner of the thing corporate against the unlawful possession by the owner of the incorporeal hereditament must oust the trespasser by injunction. * * * In the case before us, the possession was initiated by virtue of a positive contract with the owners of the fee. It was actual and peaceable. It is not alleged, nor could it be, that defendant's entry was in the beginning wrongful; all that is alleged is, that during that possession plaintiff obtained a superior right by deed without notice of defendant's right; the very case for ejectment for it is strictly a possessory action. Although in practice it has somewhat changed, its foundation and sole purpose were originally to determine the right of possession; it is still fully adequate to that purpose on these facts."

Kelly v. Keys, 213 Pa. 295, 62 Atl. 911, 110 Am. St. Rep. 547 (1906). Keys, being the owner of a tract of land, granted to Kelly the exclusive right to mine and produce therefrom petroleum and natural gas, with possession of so much of the land as might be necessary for such purposes, for a term of two years. Kelly having exercised no rights under the grant and not having entered into possession, Keys conveyed a like right to G. & S. Kelly brought ejectment against Keys, G. & S., and the court below held that this would lie. This was reversed by the supreme court. "In reaching his conclusion on the point reserved, the learned judge gave full recognition to the binding authority of *Funk v. Haldeman*, 53 Pa. 229, and the cases that follow it, wherein it is held that the grant of exclusive privileges to go on land for the purpose of prospecting for oil, the grantor to receive part of the oil mined, as in this case, does not vest in the grantee any estate in the land or oil, but is merely a license or grant of an incorporeal hereditament.

"This court has found frequent occasion to assert its continued adherence to the doctrine of these cases. Only recently, in the case of *Hicks v. American Natural Gas Co.*, 207 Pa. 570, 57 Atl. 55, 65 L. R. A. 209, it reasserted it without qualification. Once it was determined that the subject of such a grant was an incorporeal hereditament, and not an estate in the land or oil, it logically and necessarily resulted that it would not support an action in ejectment. And this view has been steadily adhered to. In no case has ejectment been sustained under such a grant, except where possession has been acquired by the grantee, and he had been wrongfully disseised. In the present case disseisin was not, and could not, be asserted. Nor could it be contended that the instrument under which Kelly claimed, though spoken of as a lease, and so denominated in the instrument itself, is in point of fact and law a lease, notwithstanding it allows possession of so much of the surface of the premises as may be necessary to conduct mining operations. This much will be implied without express stipulation; and the stipulation being expressed in no way distinguishes this from the cases where such an instrument is held to be merely a grant or license. The court below put no other construction on this, so long as it concerned no one but grantor or grantee; but because the defendants holding under a subsequent lease, being in possession, had produced and were producing oil in paying quantity, reached the conclusion that what had been the grant of an incorporeal hereditament, now that the oil had been found and was being produced, was an estate in the land, since oil was a mineral, and therefore part of the land; and that Kelly being entitled to be put in possession of so much of the estate, ejectment could be brought for such purpose.

"This line of argument overlooks the very consideration on which the authorities cited rest. In no case is it held that the grant of an exclusive right to mine for and produce oil, though it be a mineral, is a sale of the oil that may afterward be discovered. When under such a grant oil has been discovered, it is the grantee's right to produce it and sever it from the soil; so much as is thus severed belongs to the parties entitled under the terms of the grant, not as any part of the real estate, however, but as a chattel, and only so much as is produced and severed passes under the grant; as to all not produced there is no change of property. It is expressly so ruled in *Funk v. Haldeman*, 53 Pa. 229; and the same ruling was repeated and emphasized in the case next following on the same subject, *Dark v. Johnston*, 55 Pa. 164. These were the first cases in which grants of rights to explore for oil were considered and passed upon by this court. The rulings therein have been steadily and consistently followed. In this connection it is only necessary to refer to the case of *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. 173, where the grant was the same as in the present case with the additional fact that there, as here, oil had actually been discovered and was being produced, and *Barnhart v. Lockwood*, 152 Pa. 82, 25 Atl. 237.

"The reason for the rule thus established is to be found in the peculiar character of mineral oil. This is very clearly indicated in the earlier

cases, where the distinction is drawn between minerals which are fugacious in their nature, such as water, gas and oil, and those which have a fixed situs and are necessarily part of the land; and this distinction has been allowed with controlling significance whenever oil in situ has been the subject of the dispute. Both rule and reason are against the theory that prevailed with the court below, to the effect that the mineral once discovered, all that was in situ became in law part of the real estate.

"With the rights of the appellee thus defined and limited by the cases cited above, it is manifest, without discussion, that he is in no position to maintain ejectment for the property."

VI. RESERVATIONS AND EXCEPTIONS.

p. 83.

Connecticut.

City of New Haven v. Hotchkiss, 77 Conn. 168, 58 Atl. 753 (1904). See this case on page 57.

Kansas.

Barrett v. Kansas & Texas Coal Co., 70 Kan. 649, 79 Pac. 150 (1905). The following provision in a deed: "This deed is made subject to the following exceptions, reservations and conditions, to wit * * * the said party of the first part hereby reserves the coal and other minerals underlying said land," constitutes an exception and not a reservation. The title to the coal remained in the grantor, and not a mere easement to go upon the land to mine it. "However, the use of these technical words is by no means determinative of the purposes of the use of them, as not infrequently they are used interchangeably. So we must go to the entire document or in proper cases to evidence aliunde for their interpretation." This case is not one for such evidence. There is no ambiguity here. The provision quoted above "retains the coal, the thing itself, the thing then in existence. It does not take back, out of that which is granted, something not of the estate itself, a mere appurtenant to the estate granted, an easement, something that would not have existed had not the land been granted."

Moore v. Griffin, 72 Kan. 164, 83 Pac. 395, 4 L. R. A. (N. S.) 477 (1905). The owner of land, having first executed an oil and gas lease, conveyed the land, reserving all the rights, privileges and benefits secured to him under the oil and gas lease, adding "it is intended hereby to reserve all oil and gas privileges in and to said premises and to lease and transfer the same." Subsequent conveyances of this land were made in which no reference was made to the oil and gas lease, or to any exception or reservation of the oil and gas. Meanwhile the lease was canceled and cancellation thereof recorded. It was held that the knowledge of the last

grantee was immaterial, he being bound by the recitals in the first deed. The provision in that deed was an exception as distinguished from a reservation, an exception being part of the thing granted in existence at the time of the grant, while a reservation is a right of new creation arising out of the subject of the grant. See this case also on page 65.

Kentucky.

Towns v. Brown, 114 S. W. 773 (1908). A. conveyed certain property to B. the deed containing no habendum clause but the following warranty clause: "The right and title to the surface soil thereof with its appurtenances appertaining thereto except the mining privileges thereof, the said A. and wife hereby bind themselves, their heirs, etc., to warrant and ever defend unto the said B.," etc. No claim to the mining privileges and rights were made for nearly fifty years by any of the successors in interest of A. (A. and B. both being dead). "The purpose of the habendum clause of a deed is to describe and limit the character and extent of the title intended to be conveyed, and in a properly drafted deed any exception or reservation in the grant should occur in this clause in its proper place. On the other hand the warranty clause has nothing to do with the description or extent or character of the title, but deals merely with its quality." Hence the recitation concerning the mining rights would be construed as a mere limitation on the covenant of warranty, and not as a reservation of the mining rights to the grantor.

Michigan.

Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 10 Det. Leg. N. 463, 96 N. W. 468 (1903). Where in a deed part of the consideration is stated to be the reservation by the grantor of "an undivided half interest in and to all the minerals which have been or may be discovered on the premises," and in a proviso in which the grantee is required to account for ore mined and sold not for his own use or for manufacturing purposes, the interest of the grantor is described as "his joint half interest therein," such deed conveys the title to one-half of the minerals, and retains the title to the other half in the grantor.

Ohio.

Gill v. Fletcher, 74 Ohio, 295, 78 N. E. 433, 113 Am. St. Rep. 962 (1906). Plaintiff conveyed certain lands to X in fee, reserving one-half the mineral which might thereafter be found on the land. "To have and to hold the same hereby conveyed with all and singular the premises and every part and parcel thereof with every of the appurtenances (the half of plaster as above described only excepted) unto the said X, his heirs and assigns forever." Held such conveyance created an exception to the grant, leaving in plaintiff and his heirs a fee in one-half the mineral separate and distinct from the estate in the surface and the other one-half of the mineral con-

veyed to X. The construction of the deed must determine whether this is an exception or merely a reservation of a personal privilege to the grantor and dying with him; the facts justify the former conclusion.

In such case the subsurface rights cannot be lost by mere nonuser nor by constructive possession under color of recorded deeds, which are silent as to these rights. They can be lost by adverse possession only when such possession is actual, continuous, notorious and hostile. "It cannot be accomplished by secret trespass upon the owner's rights and it has been held that where there has been a severance of estates, neither the owner of the surface nor the owner of the mine can claim the other estate merely by force of the possession of his own estate."

West Virginia.

Harris v. Cobb, 49 W. Va. 350, 38 S. E. 559 (1901). M. and husband conveyed by deed to H. 52 acres of land in fee, which deed contained this provision: "The parties of the first part reserve unto themselves, and do not convey by this deed, the equal one-half part of the usual royalty of one-eighth of all of the petroleum or oil in and underlying the tract of land hereby conveyed." Held to be an exception from the operation of said deed, of the title in fee to the one-sixteenth of the oil in place in and underlying said tract of land, and to be delivered to M. when produced as royalty, without expense to her for production.

H. afterwards leased said tract of land to L., with the exclusive right to operate and drill for oil and gas, reserving one-eighth part of all the petroleum obtained from said premises, as produced in the crude state, to be set apart in the pipe line, running said petroleum to the credit of lessor. Held to be a reservation to the lessor of the one-eighth of the oil which was vested in her, and not to refer to or include the one-sixteenth which was outstanding in M.

"The parties were conveying real estate and the declaration that they were not conveying or intending to convey a certain part of a substance as much a part of the real estate as the soil itself, and as much a subject of transfer as coal, iron or other mineral, clearly made it an exception." "An exception in a deed is always part of a thing in being and a part of the thing granted, while a reservation is of a thing not in being, and is newly created,—as rent and the like. An exception withdraws from the operation of the conveyance some part of the thing granted, which but for the exception would have passed to the grantee under the general description; while the reservation is the creation in behalf of the grantor of some new right issuing out of the thing granted—that is to say, something which did not exist as an independent right." (*Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. 142, 25 S. W. 932, 24 L. R. A. 507, quoted.)

Preston v. White, 57 W. Va. 278, 50 S. E. 236 (1905). A provision in a deed conveying a tract of land that "it is expressly understood and agreed that there is reserved from and not included in the above sale or conveyance seven-eighths of all and any oil and gas that may be on, in or

under the said land," with the right to develop and operate the same, is an exception and not a reservation. It makes no difference that the word "reserved" was used instead of "excepted". The intention is the matter to be considered. " 'Except' would have been the proper word because an exception is of something that is part of the thing granted, existing at the time of the grant, as coal or oil in the land." See this case also on page 66.

CHAPTER III.

MINING LEASES: RIGHTS AND DUTIES ARISING THEREUNDER.

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| <ul style="list-style-type: none">I. Effect upon the Lease of the Nonexistence, Exhaustion, or the Unmerchantability of Minerals.II. Duties and Obligations of the Lessee.<ul style="list-style-type: none">A. Lessee's Duty to Mine.B. Covenants to Work Mines.<ul style="list-style-type: none">(a) Covenants Simply to Mine.(b) Covenants to Mine a Certain Amount.(c) Covenants to Sink Wells and Conduct Oil and Gas Operations.(d) Covenants as to Man- | <ul style="list-style-type: none">ner of Working the Mine and as to the Condition of the Mine.C. Duty and Covenants to Pay Taxes.D. Rent and Royalty.III. The Premises.<ul style="list-style-type: none">A. Rights Growing out of the Description or Nature of these or Incident thereto.B. Fixtures and Appurtenances.IV. The Subject of the Lease and the Right of the Lessee to Minerals not Enumerated in his Lease. |
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I. EFFECT UPON THE LEASE OF THE NONEXISTENCE, EXHAUSTION, OR THE UNMERCHANTABILITY OF MINERALS.

p. 88. The rule laid down by Judge Dallas in *Ridgely v. Conewago Iron Co.* (vol. 1, p. 89) is now generally followed. The only departure from it is in Pennsylvania where it was held in *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236, which is followed in the later cases, that where the existence of minerals is determined before the lease is entered into, the lessee, when he covenants to pay royalty on a minimum production, takes the risk of quantity, and exhaustion therefore is no defense to an action for minimum royalty.

Whether or not the fact of continued possession prevents a lessee from setting up the defense of exhaustion, the authorities differ.

In Colorado it has been held that the nonexistence of minerals of merchantable quality excuses the lessee from the performance of the obligation of diligent prosecution of operations.

Alabama.

Brooks v. Cook, 135 Ala. 219, 34 So. 960 (1902). A lease granted the mineral rights on certain designated lands for a term of ten years, the lessees to pay a royalty of fifteen cents per ton on not less than 100 tons per month during the continuance of the contract, a failure to pay at the rate of 100 tons per month to render the lease void. In an action to recover royalties due on the basis of the minimum of 100 tons per month, held that "We have but to call attention to the recitals of the lease to see that the payment of the royalty was based upon the assumption of the parties that ore existed under the land. The grant was of the ore in place, and, if the subject-matter of the contract failed, the price is not payable.

* * * If it is established by actual and exhaustive search that at the time the contract was made there was in fact no ore upon the land, upon no fair and reasonable construction of the contract can the defendant be held liable for royalty. * * * The lease was nothing more or less than a sale by them of iron ore, which they supposed they owned, hidden, it is true, under the earth—a supposition also indulged by the lessees. But, if both were mistaken in their supposition as to the existence of the ore, then the obligation of the lessees to mine, upon a discovery of this mistake, was at an end, as was likewise their obligation to pay royalty upon the ore to be mined."

Brooks v. Cook, 141 Ala. 499, 38 So. 641 (1904), follows and quotes the last case.

Colorado.

Colorado Fuel & Iron Co. v. Pryor, 25 Colo. 540, 57 Pac. 51 (1898). A lease provided that the lessee should work the premises in a manner necessary to good and economical mining as a coal mine, and that, for the purpose of putting them in condition for such mining, work should commence on a specified date and be prosecuted with reasonable diligence. The lessee was to pay a fixed royalty on each ton mined. Held that, in general, the right to mine having been granted, the law implies that the lessee should exercise reasonable diligence in working the mine (Koch's Appeal, 93 Pa. 434); but that, unless coal actually existed on the premises of a merchantable grade, which could be procured at a reasonable profit, or, if none existed, or that which was found was valueless, then, under this contract of lease the lessee would be under no such obligation. Whether there was merchantable coal under the demised premises, and, if so, whether reasonable diligence was exercised by the lessee in endeavoring to reach it, are questions of fact. Expert testimony is admissible on the former question, and where such evidence is conflicting, the finding

of the trial judge that the coal was of a merchantable grade will not be disturbed on review.

Indiana.

Kokomo Natural Gas & Oil Co. v. Albright, 18 Ind. App. 151, 47 N. E. 682 (1897). A. contracted with the company that it might have the exclusive right for five years to drill and operate a well or wells for water, oil or gas on a plat of ground, twenty feet square to be mutually agreed upon on land described, for which the company agreed to furnish free of charge gas for lighting and heating four residences and pay \$100 per annum "whether a gas well is drilled or not."

In an action for rent it is not necessary to aver that gas was obtained or could have been obtained on the premises described, or that the plaintiffs had offered to agree upon and fix a location for a well. It was enough to aver that they were ready and willing to agree upon a location. The contract did not contain any covenant that gas could be found on the premises, and the company manifestly assumed the chance of a failure to find it and of its nonexistence there.

Moon v. Pittsburgh Plate Glass Co., 24 Ind. 34, 56 N. E. 108 (1900). A "gas-lease" provided that the lessee should pay to the lessor an annual rental of one hundred dollars for each gas well drilled which produced gas in paying quantities sufficient for manufacturing purposes; said payments to continue as to each of said gas wells annually during the continuance of the lease, which was to terminate whenever natural gas ceased to be used generally for manufacturing purposes. A gas well was drilled by the lessee and the annual rental paid thereon for two successive years. The rental maturing for the three following years was not paid, namely rental maturing on September 1, 1896, Sept. 1, 1897, and Sept. 1, 1898. The well had been abandoned by the lessee Sept. 1, 1896, as it did not pay to operate it. In an action for \$300 unpaid rental, it was held that the lessor could recover only the ratable portion of the annual rent of \$100 for the use of the well up to the date at which the well became unprofitable, but that the lessor's claim for subsequent years could not be sustained, as at such periods the well was not producing gas as contemplated by the contract and had been abandoned.

Iowa.

Bloomfield Coal & Min. Co. v. Tidrick, 99 Iowa, 83, 68 N. W. 570 (1896). A lease of coal lands for 20 years provided (1) that if coal should be found sufficient in quantity and quality to justify mining, the lessee should proceed at once to mine and continue to do so as long as coal in paying quantities should be found. (2) That lessee should pay a royalty of 1 cent per bushel, etc. (3) That lessee should mine not less than 2,400 tons per year after the first year, and that whether this amount were mined or not lessee should pay full royalty for that amount, viz., \$300.

Lessee did not mine the land for five years, but paid \$300 per annum after the first year. Then upon testing the land it was found to contain no coal. Lessee then brought this action to recover the money paid, alleging mutual mistake as to the existence of coal and a failure of consideration. Held he could not recover. "That the parties supposed there was coal in the land and in quantities so that the minimum amount could be mined is true; and it may be conceded that, upon the discovery of the fact that there was not, the lease would become inoperative." It was for the plaintiff to make the test and the payments made were not only compensation for coal mined, but were payments to prevent forfeiture of the lease.

Kentucky.

Givens' Ex'rs v. Providence Coal Co., 22 Ky. Law Rep. 1217, 60 S. W. 304 (1901). A coal lease provided that the lessee should "take out and ship and pay for not less than 500,000 bushels of coal each year, * * * and if he shall fail to take out and ship as much as 500,000 bushels, he agrees, notwithstanding such failure, to pay royalty on stated quantity, provided however, that should the party of the second part (lessee) be prevented, by any accident or casualties, without fault on his part, or by accident or circumstances not under his control, to get out and ship 500,000 bushels in any one year, then he shall for that year pay for only so much as he does take out and sell." Held that the unexpected inferiority of the coal, making it unsalable except at such times as transportation for it could not be had, was included in the phrase "circumstances not under his control," for the lease shows that the parties had in mind not only difficulties in the taking out or mining of the coal, but also in shipping and selling. The trial court "properly refused to instruct the jury that if the coal could be gotten out, screened free of impurities, and shipped at a cost not exceeding the market price at the time the contract was made, the company (lessee) was bound to resort to such modes of cleaning it. The price of the coal at the time of the sale must control, and not the price at the time the contract was made; for if the coal was so inferior that to clean it so as to make it salable as good coal, in ordinary conditions of the market, would cost more than it would bring, the coal was in fact worthless for such purposes. * * * Its (the lessee's) liability to ship the coal would depend on the market at the time, and not on what it was ten years before."

Rowland v. Coxe, 28 Ky. Law Rep. 307, 89 S. W. 215 (1905). A. contracted to sink an oil well to the depth of the first sand, his lease providing that "unless said test well proves fruitful, that is, produces oil, then this lease and contract shall be considered null and void, and of no effect whatever." At the depth of 489 feet A. salted the well and then conveyed to B., who in turn conveyed to C. On discovery of the fraud C. began suit against B. to recover his purchase money. Held that the plaintiff was entitled to recovery even though B. was wholly innocent in the case. This is not a case where the purchaser speculated and lost. He did

speculate as to the actual amount of oil in the well, but C. bought on the idea that the well was oil producing; he was not speculating on the chance that there was no oil in the well. It is true there was a mutual mistake, but A. had nothing to convey (his abandonment of the well before discovering oil terminated his lease), hence B. could no more retain C.'s money than A. could retain B.'s.

B. set up that the lease called for boring to first sand, and that it might yet have produced oil. But the well, when abandoned, was not oil producing; the contract contemplated the continuous boring of the well, hence the termination canceled the lease.

Michigan.

Blake v. Lobb's Estate, 110 Mich. 608, 68 N. W. 427 (1896). B. leased a tract of land to L. for 20 years "for the purpose of exploring for, mining, taking out and removing therefrom the merchantable iron ore which is or which hereafter may be found on, in or under said land." The lessee agreed to pay rent of \$6,000 per annum and also royalty on ores removed, royalties, however, to apply to the payment of the rent. Lessee had the right to terminate the agreement "so far as it requires (him) to mine ore on said land or to pay a royalty therefor" by giving 60 days' written notice.

Such notice was given and this suit was brought for rent accruing prior to the notice. The defense set up was that no iron ore in minable quantities existed on the premises. The court charged that if it was found that there was no iron ore, no merchantable iron ore, on the property in sufficient quantities to make it pay and the lessee had used all reasonable endeavors to ascertain that, plaintiff could not recover. This was approved on authority of *Gribben v. Atkinson*, 64 Mich. 651, 31 N. W. 570. "The lease by its terms presupposed the existence of ore and upon its appearing that no such ore was to be found, the purpose of the lease failed and the defendant should not be charged with the consideration." It makes no difference whether the consideration is called rent or royalty.

Hewitt Iron Min. Co. v. Dessau Co., 129 Mich. 590, 8 Det. Leg. N. 1093, 89 N. W. 365 (1902). Where a mining lease provides that the lessee shall pay a certain royalty on all ore mined, that there shall be mined each year enough of the ore to pay a certain amount of royalty at the rate thus fixed, and that that amount shall be paid whether such quantity be actually mined or not, the lessee is not obliged to pay royalty after the exhaustion of the ore and inability of the lessee to discover further deposits in paying quantities; thereafter the lessor is entitled only to the royalty actually earned.

Minnesota.

Diamond Iron Min. Co. v. Buckeye Iron Min. Co., 70 Minn. 500, 73 N. W. 507 (1897). Plaintiff leased land to defendant for 25 years "for the purpose of exploring for, mining, taking out and removing therefrom the

merchantable shipping iron ore which is or which may be hereafter found on, in or under said lands." Lessee was given the right to terminate the lease at any time on 60 days' notice, and covenanted to pay royalty on ore mined and removed; to mine and remove at least 10,000 tons each year, and if it failed to do so to pay royalties on that amount. Lessor had the right, at its option, to cancel the lease if lessee failed to take out the minimum amount.

Both parties executed the lease on the supposition that the premises contained large quantities of merchantable shipping iron ore, although at the time none had been actually found. Defendant spent \$40,000 developing the land and demonstrated the fact that no such ore existed upon the land. Plaintiff brought this suit to recover minimum royalties.

Mitchell, J.: "Upon a quite thorough examination of the numerous cases cited by counsel three facts have impressed themselves upon us, viz.: First, that the courts have frequently made their decisions to turn upon the form of words used in this particular covenant, rather than upon an entire consideration of the various provisions of the instrument, in order to ascertain its scheme and subject matter; second, that they have often failed to distinguish between the subject-matter of the contract and mere matter of inducement to its execution; and third, that the courts have been more or less influenced by their familiarity with the doctrines of the common law relating to landlord and tenant, which are usually favorable to the landlord.

"Mining leases containing a covenant for the payment of a minimum rent or royalty may be divided into two general classes: First, those which require its payment as a dead rent, irrespective of produce; and second, those which require the mining of a stipulated amount of ore, or upon failure to do so, payment of the royalty upon it. Where the covenant is of the first class, the lessee is liable to pay this minimum royalty as a dead rent, even if no ore existed. Where the covenant is of the second class, it has been generally construed as an obligation to pay for the stipulated quantity of ore, whether mined or not; not whether it existed or not,—that is, that the lessee contracts for diligence and promptitude in mining, but not for the productiveness of the mine. In our opinion the covenant in the leases under consideration is of the second class.

"Of course, we understand that the mere fact that the leased premises proved to be of less value than was supposed is no defense to an action for rent. In other words, the nonexistence of things which were mere matters of inducement to the execution of the contract will not relieve a party from its obligations. But the case is entirely different where the thing contracted for, and which constituted the subject-matter of the contract, had no existence.

"In the present case, merchantable shipping iron ore, which the parties supposed existed, and not the land, was the subject-matter of these contracts. It is true, they start out in form as leases of the land; but this is only for mining purposes, and every right which the defendant is given in the land is merely incident and auxiliary to the mining and taking out merchantable

shipping ore. The *reddendum* clauses all provide for the payment of 'royalty' on ore, which is never spoken of as rent for the land."

"The fact that defendant had not formally terminated the lease does not interfere with its right to resist payment of royalty on the ground that it had not accrued due by reason of the nonexistence of merchantable shipping ore."

Missouri.

Lennox v. Vandalia Coal Co., 158 Mo. 473, 59 S. W. 242 (1900), affirming 66 Mo. App. 560 (1896). Plaintiff leased land to defendant to mine coal for twenty years, lessee to "continue mining operations until all the workable coal shall be taken out," paying royalty therefor, on a minimum monthly prescribed production. The lease also gave to lessee the use of a part of the demised premises for the purpose of removing coal from adjoining land.

Held defendant cannot defend an action for minimum royalty on ground of exhaustion of the coal, so long as it retained possession of the land for any purpose under the lease.

Ohio.

Brick Co. v. Pond, 38 Ohio, 65 (1882). By agreement P. leased to the Brick Co. "all the clay that is good No. 1 fire clay" on certain land for the term of three years, upon condition that the Brick Co. should mine 2,000 tons of clay each year and pay a royalty therefor, as it was taken away. The right was reserved to cancel the lease at any time after the first year in case P. should sell the land.

The court stated that this agreement was properly pleaded as a contract; that it is not a lease of the land, but of the clay; that it is "a contract for the privilege of mining and removing the kind of fire clay specified, as distinguished from a lease of the land."

The action was to recover royalty for the term on 2,000 tons per annum. It was held to be a good defense to this action that clay of the quality and quantity specified in the agreement did not exist on the land. The burden of proving this was on the defendant, but it was error to hold him liable during his possession, while searching for clay, if none of the quality named was on the land.

Hankey v. Kramp, 12 Ohio Circ. Ct. R. 95 (1896). A lease of lands for oil and gas purposes provided that should gas be found in sufficient quantities to justify marketing the same, the consideration to the lessor should be \$100 per annum for the gas from each well so long as it was sold therefrom. The fact that lessee had connected wells with its pipe line from which it sold gas was conclusive of the right of lessor to recover rental therefor, and lessee could not defeat that recovery by evidence that these wells did not produce gas in sufficient quantities to justify marketing it.

Pennsylvania.

Young v. Equitable Gas Co., 5 Pa. Super. Ct. 232 (1897). See this case on page 139.

Bannan v. Graeff, 186 Pa. 648, 40 Atl. 805, 42 Weekly Notes Cases, 350 (1898). "There was no absolute obligation in the lease in question to pay a fixed royalty or rental throughout the whole period of the term, as there was in *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236, and therefore the liability of the lessees must be measured by the ordinary reading of the terms of the contract. The sixth clause of the lease provides that the lessees shall mine and ship each year as much coal as will produce \$5,000 yearly at the rents designated 'unless prevented from doing so by any unavoidable accident or occurrences beyond their control.' If therefore the coal on the premises became exhausted before the end of the term this would be an occurrence beyond their control, which would absolutely prevent them from taking out the quantity necessary to make up the annual rental of \$5,000." The exhaustion of the minerals was, therefore, a defense to an action of assumpsit on the lease.

Wilson v. Beech Creek Cannel Coal Co., 7 Pa. Super. Ct. 241 (1898). The court having left to the jury the question whether merchantable coal existed in the seam, in accordance with the ruling in 161 Pa. 499 (vol. 1, p. 99), they found for the defendant.

"The construction placed upon the agreement by the Court below was the correct one. The defendants were obliged under the lease to pay the agreed rental only in case the Soult Seam was found upon the premises with the coal in the cannalized condition which gave the coal of the Soult Seam its peculiar value. They submitted testimony to show that while the strata continued onto the property leased, yet the particular kind or quality of coal peculiar to the Soult Seam was absent. On this testimony they went to the jury claiming that they were unable to find upon the property and had, therefore, not received that for which they had agreed to pay. The court below instructed the jury that this was a good defense under the terms of the lease. There was no error in this."

The plaintiff contended that even if the coal was not merchantable, the defendants were liable for the rent because they had retained possession of the lease.

Acme Coal Co. v. Stroud, 5 Lack. Leg. N. 169 (1899). A coal lease demised certain premises which the lessees were to have and hold "until all the merchantable coal * * * available by proper, skillful and careful mining" should be exhausted, paying meanwhile a certain royalty per ton on the coal mined. Held that the coal was not to be considered unmerchantable merely because the lessees were unable to sell it at the ordinary market prices and at a profit. If the coal could be sold at all and is not worthless, the lessees are not excused from mining and paying for it. Even if the coal were rusty, if by careful cleaning and preparation the defects could be removed, the lessees would be bound to give it that attention even if it involved them in a pecuniary loss. "They cannot stop

mining or refuse to pay royalties simply because they cannot mine to their own profit and advantage."

Boal v. Citizens' Natural Gas Co., 23 Pa. Super. Ct. 339 (1905). Land was leased to defendant "for the sole and only purpose of drilling and operating for petroleum oil and gas," the lessee agreeing to pay a royalty on the product and also to furnish the lessor with natural gas for heat and light for his residence. Lessee drilled one well. Held its exhaustion was not a defense to an action for breach of covenant.

"The lease contains no forfeiture clause, and no clause as to the number or depth of wells to be drilled or as to the time when operations were to begin, or as to finding oil or gas in paying quantities, and no release, surrender, forfeiture or eviction is alleged. It is to be observed further, that the lease contains no stipulation, and nothing from which it can be implied, that the gas to be furnished to the lessor for use at his residence was to be produced from the leased premises. So that, even if it were averred, which it is not, that the gas upon the leased premises is exhausted, impossibility of performance of the covenant could not be set up as a defense to the present action. As we view the case, the simple question of law raised by the affidavit is, whether it was within the power of the lessee to discharge itself from the obligation of the covenant by ceasing its operations when the production of gas from the single well it drilled ceased. To state the question is to answer it."

Steele v. Maher, 38 Pa. Super. Ct. 183 (1909). A deed granted for a period of twenty-one years "the exclusive right and privilege of mining and developing all the coal in and underlying" a certain tract of land in consideration of a royalty, payable every three months. The grantee covenanted to commence operations within six months, and to continue without unnecessary delay, and after one year from the commencement of operations to mine each year not less than four thousand tons, and to pay each year the sum of \$400 "as royalty, whether the amount of coal mined in each year would amount to a royalty of that much or not." There were also provisions of forfeiture for failure to mine not less than four thousand tons per year or pay the minimum royalty.

At the date of the lease a vein of coal, known as the Freeport vein, was exposed by outcrop on the tract, and a mine on the same vein, on other land, had been opened and worked before the agreement was made. The grantee and his assigns opened up and developed the tract and mined coal for about ten years, and paid the minimum royalties thereon. It was held that the exhaustion of coal was not a defense to an action to recover the minimum royalty, and that it was not error to exclude evidence that the grantee was not acquainted with the premises or the coal thereunder at the time he entered into the agreement.

"It will be seen from the foregoing statement of facts, that, like *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236, this is not the case of parties dealing under a mutual mistake as to the existence of the subject of a contract, where afterwards it was proved to have had no existence. Again, like that case, the parties presumably knew, at the time they contracted, that

there was coal underlying the tract. It is true the defendant offered to testify that he entered into the agreement without knowing the quantity or quality of the coal in the tract, but he does not deny that he had the knowledge which his eyes must have given him, if he looked at the outcrop and at the open mine in the same vein near by. Nor does he allege that he was deceived, misled or put off his guard by any act or representation of the other parties to the agreement. The parties did not contract upon a mere supposition or surmise as to the existence of coal in the tract, but with actual knowledge of that fact. As in the case cited, so here, the existence of the coal was undoubted, and the only element of uncertainty was the quantity. Admitting the truth of all the defendant offered to prove, there was no such difference between the conditions existing at the time these two instruments were executed as detracts in the slightest degree from the applicability of that decision in the construction of the agreement before us." "But it is contended that *Timlin v. Brown* was modified by the later case of *Boyer v. Fulmer*, 176 Pa. 282, 35 Atl. 235. It is apparent, however, that the Supreme Court did not intend the latter case to have that effect, for Mr. Justice Green said at the outset of his opinion: 'The learned court below ruled this case upon the authority of *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236. If the obligation of the defendant were the same as the obligation of the lessees in that case the ruling would be correct.' In the still later case of *Bannan v. Graeff*, 186 Pa. 648, 40 Atl. 805, *Timlin v. Brown* was distinguished from that case, but the correctness of the conclusion there reached, that the instrument created an absolute obligation to pay a fixed rental or royalty throughout the whole term, was distinctly recognized. The reasoning of the opinion of Justice Dean in *Timlin v. Brown* fully vindicates that conclusion, and by no amount of justifiable ingenuity is it possible to reconcile with it a conclusion in the present case that the obligation to pay ceased upon the virtual exhaustion of the coal."

Holt v. Kelley, 224 Pa. 620, 73 Atl. 947 (1909). A lease of land to operate and remove therefrom the merchantable and workable coal provided for the payment of royalty and for the mining of a minimum quantity of coal each year; and further "that the coal to be mined under the provisions of this agreement shall be merchantable and workable coal, and it shall be optional with the said lessees whether to work and mine any coal the vein of which is less than two feet six inches in general thickness, except in cases of local faults," etc. In an action to recover minimum royalties the burden is upon the lessees to satisfy the jury that they have made such investigations and explorations of the premises as to warrant the conclusion that the coal remaining therein is less than two feet six inches in general thickness. Failing to establish this, the lessor is entitled to recover.

Tennessee.

McGavock v. Virginia-Carolina Chemical Co., 114 Tenn. 317, 86 S. W. 380 (1904). A lease of a mine with the right to take phosphate rock provided

that the lessee might terminate it if at any time rock of a fixed standard should become exhausted, and that the quality of the rock, if it should ever be in question, was to be determined by experts named. Held that the lessee did not have the right to abandon on the ground of the inferiority of the rock until this had been determined in the manner prescribed. "The stipulation in the present contract is not for a submission to arbitration of the rights of the parties in consequence of a breach of a contract, but it is a stipulation naming experts, who, after tests applied, shall determine whether the lessee has a right to refuse to carry on his contract, and this depends upon the result of their tests." "In all such cases it is uniformly held that the submission provided for must be carried out, the test applied, and the result reached as a condition precedent to do the thing about which controversy exists."

Moreover, the fact that ore was found in pockets and not in stratified layers, and so was possibly more difficult to mine, does not affect the question if the quantity is there, especially where the lessee examined the ground before executing the lease.

Washington.

Adams v. Washington Brick, Lime & Mfg. Co., 38 Wash. 243, 80 Pac. 446 (1905). A lease of land containing clay suitable for brick making, for a term of five years provided that the lessee should pay the lessor a certain royalty on all brick manufactured from clay taken from the land, such royalty, however, to be not less than \$200 each year, which was to be paid even if the royalty on the brick sold was less than that amount; and the lessee agreed not to sublet or use the premises for any other purpose than that of a general brick business. The clay became exhausted at the end of three years, of which fact the lessee notified the lessor. It was held that the lessee was not liable to pay even the minimum royalty after the exhaustion of the clay. This was not a lease wherein rent was to be paid in any event, but a contract founded upon the supposition that clay existed and would continue to exist in the premises for the term of the contract. The existence of clay was not merely an inducement to the making of the contract with brick making as an incident to defendant's possession, but the making of brick from the clay found on the premises was the very subject-matter of the contract, the use of the premises for any other purpose being prohibited. Even though the lease expressly provided for its termination in various other methods, this did not prevent the lessee's right to terminate it because of the exhaustion of the clay.

II. DUTIES AND OBLIGATIONS OF THE LESSEE.

A. Lessee's Duty to Mine.

p. 100. In the case of the solid minerals there is, as is shown in the first volume of this work, an implied obligation upon the

lessee to mine only when the lessor's return depends upon the production of minerals. There is no such obligation where the amount of rental is not fixed by the product. In this case the failure to mine is a matter of indifference, if not of actual benefit to the lessor.

The lessor's interest is different in the case of the fugitive minerals. They cannot be kept locked in the earth by merely refraining from mining operations, for they are constantly liable to be withdrawn by operations on other ground or by natural causes. In oil and gas leases, therefore, there is always an obligation to proceed with operations diligently, and diligent, careful operation in this connection includes the protection of the lines, as well as the production of the oil and gas. The lessor must begin operations within a reasonable time, and open such wells as may be reasonably necessary to obtain the product for the advantage alike of both parties. In determining the number of wells, their location and the character of work to be done, the lessor is entitled to use his own judgment so long as he does so in good faith, and is not guilty of fraudulent practices.

The federal courts of the Eighth Circuit dissent from this view, holding that neither party is the arbiter of the question of the extent of the operation but both are bound by what is reasonable. (See *Brewster v. Lanyon Zinc Co.*, below.)

Of course, under those instruments which amount only to an option, the obligation to develop the ground is clear, that being, as has been shown, a condition of the continuance of the lessor's interest. (See page 75, above, and cases there collected.)

United States.

Huggins v. Daley, 40 C. C. A. 12, 99 Fed. 606, 48 L. R. A. 320 (1900). 4th Circ. Where a lessor grants to a lessee all the oil and gas in and under the land described, and also the said tract of land for the purpose of operating thereon for oil and gas, such a lease is not, according to well settled law in West Virginia, a grant of property in the oil or in the land, but merely a grant of possession for the purpose of searching for and procuring oil. "The title is inchoate and for the purpose of exploration only until the oil is found. If it is not found, no estate vests in the lessee; and, where the sole compensation to the landlord is a share of what is produced, there is always an implied covenant for diligent search and operation."

Allegheny Oil Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764 (1900). 6th Circ. A lease whose purpose and object are the development of oil and

gas in premises leased "has written into it an implied covenant on the part of the lessee that he will drill and operate such number of oil wells on the lands as would be ordinarily required for the production of oil contained in such lands, and afford ordinary protection to the lines." See this case on page 67.

Sharp v. Behr, 117 Fed. 864 (1902). C. C. E. D. Pa. Where the grantee of mining land agrees, as part of the consideration for the grant, to pay the grantor a certain royalty on each ton of ore shipped for 20 years, there is an implied undertaking on the part of the grantee to operate the mine with reasonable diligence, even though no minimum annual quantity was agreed to be shipped, and the grantor is entitled to damages for breach of this agreement.

Barnsdall v. Boley, 119 Fed. 191 (1902). C. C. D. W. Va. A lease was expressly made "for the purpose and with the exclusive right for operating thereon for oil and gas." It was for the period of 5 years, and as much longer as oil or gas was found in paying quantities, and provided for the payment of a royalty to the lessor. The lessee, as required by the lease, drilled one well within three months after the execution of the lease, and the well produced a little oil on which the lessee paid the agreed royalty, but though the lessor frequently asked him to develop the land further, the lessee did nothing more, alleging as a reason that an adjacent owner had refused to allow the lessee to transport a rig for drilling across the former's land, which route was not the only one by which a rig could have been brought to the leased premises. Held that equity would consider that the lessee had forfeited his right to the premises after five years because he had failed properly to develop the property, and that the fact that he had drilled one well within three months and had operated it spasmodically at a loss, or at least at a very small profit, would not prevent the forfeiture. A lessee cannot keep a lease such as this in force indefinitely simply by drilling one nonproductive well and then saying that this nonproductive well, in his judgment, produces oil in paying quantities. It is for him to determine whether the quantity of oil found warrants the pumping of the well, but he must exercise the prudent discretion of a business man in doing so, or else his decision will be disregarded by a court of equity.

Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co., 61 C. C. A. 359, 126 Fed. 623 (1903). 6th Circ. Where a lease demises lands for the purpose only of operating thereon for oil and gas, so long as oil and gas shall be found thereon in paying quantities, the lessor to be paid a certain royalty on the oil produced, there is an implied covenant on the part of the lessee to commence drilling operations within a reasonable time, and where, therefore, the lessee does nothing to develop the land during a period of four years, the lessor may treat the contract as abandoned and may make a valid lease of the premises to another.

Kellar v. Craig, 61 C. C. A. 366, 126 Fed. 630 (1903). 4th Circ. In all leases for oil and gas purposes, a covenant to protect the lines and develop the land leased is implied by law, and mere general covenants to

that effect expressed in the lease, not requiring any particular number of wells to be drilled nor at any special designated points along the line or on the land, add nothing to the obligations of the lessee under such a lease. "In such leases, where general covenants of that character are found or are implied, the lessee or his assigns are permitted to determine the character of the work to be done, and such ascertainment by him or them, in the absence of fraud, disposes of the question."

Brewster v. Lanyon Zinc Co., 72 C. C. A. 213, 140 Fed. 801 (1905). 8th Circ. The lessee in an oil and gas lease expressly covenanted (1) to drill a well within two years, with a right to enlarge the right to five years by the payment of an annual rental; (2) to drill no well nearer than 300 feet to any building on the premises, and to occupy not exceeding one acre of the surface in connection with any well; (3) to pay to the lessor one-tenth of all oil produced and saved; (4) to pay \$50 per annum for every well from which gas should be used off the premises. It was then provided that a failure "to comply with any of the above conditions renders this lease null and void." "The implication necessarily arising from these provisions—the intention which they obviously reflect—is that if, at the end of the five year period prescribed for original exploration and development, oil and gas, one or both had been found to exist in the demised premises in paying quantities, the work of exploration, development and production should proceed with reasonable diligence for the common benefit of the parties, or the premises be surrendered to the lessor. That this was of the very essence of the contract is shown by the extensive character of the grant, which was without limit as to time and included all the oil and gas in or obtainable through the demised premises; by the provisions for the payment of substantial royalties in kind and in money on the oil produced and saved and the gas used off the premises, which, as contrasted with the consideration paid when the lease was executed, shows that the promise of these royalties was the controlling inducement to the grant; and by the provisions contemplating the drilling and operation of wells, the production and transportation of oil and gas, and the prosecution of that business subject to the restrictions prescribed."

"The covenants of the lessee are introduced into the lease by the statement that the grant is made 'on the following terms,' and are followed by a stipulation that the lessee's failure to comply with 'any of the above conditions' shall render the lease null and void. These provisions make it plain that it was the intention of the parties to make the covenants of the lessee conditions as well as covenants, and to reserve to the lessor the right to avoid the lease for the breach of any of them." And this includes the implied covenant for diligent development and production, which is, therefore, a condition for whose breach forfeiture may be declared.

"If they do not proceed with reasonable diligence, and by reason thereof the oil and gas are diminished or exhausted through the operation of wells on adjoining lands, the lessor loses, not only royalties to which he would otherwise be entitled, but also his contingent interest in the oil and gas

which thus passes into the control of others. The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule in respect of all other contracts where the time, mode or quality of performance is not specified, and no reason is perceived why it should not be equally applicable to oil and gas leases. There can, therefore, be a breach of the covenant for the exercise of reasonable diligence, though the lessee be not guilty of fraud or bad faith." The rule on this point laid down in *Colgan v. Forest Oil Co.*, 194 Pa. 234, 45 Atl. 119, 75 Am. St. Rep. 695, and *Kellar v. Craig*, 61 C. C. A. 366, 126 Fed. 630, is disapproved. "No obligation rests on him to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required. Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, such as the quantity of oil and gas capable of being produced from the premises, as indicated by prior exploration and development, the local market or demand therefor or the means of transporting them to market, the extent and results of the operations, if any, on adjacent lands, the character of the natural reservoir—whether such as to permit the drainage of a large area by each well—and the usages of the business." "The existence of gas in paying quantity in one of the tracts was an ascertained fact. Both oil and gas were being produced in paying quantities from the lands surrounding that tract and also from those surrounding the other. The consequent reduction of the underlying supply of these migratory minerals was operating to the serious disadvantage of the lessor. The necessary inference from what is stated is that farther exploration and development would have been profitable to the lessee as well as beneficial to the lessor. In these circumstances the prolonged failure of the lessee to proceed with the contemplated operations, though due to a mistaken view of the obligations imposed by the lease, was a plain and substantial breach of the covenant and condition in respect of the exercise of reasonable diligence, and entitled the lessor to terminate the lease."

California.

Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 Pac. 296 (1903). In oil leases, where the consideration is solely the payment of royalties, there is an implied covenant not only that wells will be sunk, but that if oil is produced in paying quantities they will be diligently operated for the best advantage and benefit of both the lessee and the lessor. Such an implied covenant stands upon the same footing as if it were expressed, and, if it is not performed, the lessor may reenter and terminate the lease.

McIntosh v. Robb, 4 Cal. App. 484, 88 Pac. 517 (1906). A mining lease in which the term was not specified provided for the payment of royalty

in six semi-annual payments, the first one in six months from the execution of the lease. The lessee neither paid royalties nor did any work for eighteen months, and it was held there was an implied covenant on his part to begin work in a reasonable time and to proceed with reasonable diligence, and his failure to do so, coupled with the nonpayment of royalty, operated to terminate the lease.

Indiana.

Diamond Plate-Glass Co. v. Tennell, 22 Ind. App. 132, 52 N. E. 168 (1898). A lease for the purpose of operating for gas provided that the lessee should pay an annual rental of \$100 for each well drilled which produced gas in paying quantities, payments to commence Jan. 1, 1892, and until the drilling of a gas well lessee should pay an annual rental of eight dollars. There was no covenant by the lessee to drill wells. Held that lessee was liable only for \$8 per annum until a well was completed, although he did nothing no prosecute operations.

Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452 (1899). In leases of mineral lands, where the lessee agrees to pay the lessor a royalty or rent, which depends on the amount of the coal or other product mined, the lessee thereby, in the absence of any provision to the contrary, impliedly obligates himself to begin the development of the coal, and the mining thereof, within a reasonable time after the execution of the lease. What may be regarded as a reasonable time depends upon the circumstances of the particular case. "Where the rent to be paid to the lessor is a royalty measured by so much per ton on the product mined, the authorities affirm that it is not within the option or discretion of the lessee to fail to develop and operate the mines upon the leased premises for an indefinite or unreasonable time." A failure upon the part of the lessee, for an unreasonable length of time, to carry into effect the purposes of such a lease by opening and working the mines underlying the leased premises, will be held to operate as a forfeiture of his rights.

A lease which reserved a royalty depending on the amount of coal mined provided that if the lessee should fail for eighteen months from the date thereof to commence the necessary work for developing the coal interest therein leased, by opening coal shafts on the leased premises by, through or from which the coal underlying the premises could be mined and removed, it should be lawful for the lessors to re-enter the premises and the lease was thereupon to become null and void. Held that the mere erection and equipment of a shaft within the stipulated period, upon the leased premises, by which the underlying coal could be mined and removed, could not be held to bring the lessee fully within the requirements of the lease. It was evidently the intention of the parties that the development of the coal interest should be actually begun in good faith by the lessee within eighteen months from the time the lease was executed, and that a violation of this condition, as expressly stipulated, should operate to render the lease null and void. The instrument in question can-

not, in reason, be interpreted or held only to require the lessee to supply the means for developing the coal under the leased premises, and then permit him to fail or neglect thereafter, for a period of twelve years, to employ such means for the purpose intended.

Gadbury v. Ohio & Indiana Consol. N. & I. Gas Co., 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895 (1903), reversing 65 N. E. 289. In consideration of the sum of \$1, the owner of the land granted all the oil and gas in and under the land, with the right to enter thereon for the purpose of drilling for oil and gas, reserving to the grantor a royalty of one-sixth of all oil produced and saved from the premises. In case gas only was found, the grantor was to be paid \$100 each year for the product of each well while the same was being used off the premises, and to have gas free of cost for domestic purposes. In case no well was completed within forty days, the lease was to become null and void, unless the grantor was paid \$1 per day during the time such completion was delayed. The grantees completed a well, and gas was found in paying quantities, but they closed the well and allowed it so to remain for two years. Held that an obligation to explore and develop the property was implied, and, thus implied, was such an essential part of the contract as to amount to a condition subsequent, since it constitutes practically the entire consideration for which the grant was made. The failure of the grantees to operate the well, therefore, prima facie authorized the grantor, without demand, to treat the grant as abandoned, and to retake possession of the premises.

Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363 (1904). See this case on page 210.

Indiana Natural Gas & Oil Co. v. Grainger, 33 Ind. App. 559, 70 N. E. 395 (1904). Where land is leased for the purpose and with the exclusive right in the lessee to drill wells and operate for oil and gas for 12 years and as long thereafter as oil or gas is produced in paying quantities, reserving to the lessor certain royalties and well rentals, and the lessee agrees to commence operations within a year or else pay to the lessor \$20 per year until a well is completed, the lessee, by making the annual payments, cannot hold the premises longer than 12 years without drilling or commencing to drill a well, and he can hold the premises as long beyond the 12 years as oil and gas can be produced in paying quantities, upon payment of the royalties and well rentals stipulated in the lease.

Car v. Huntington Light & Fuel Co., 33 Ind. App. 1, 70 N. E. 552 (1904). Where a lease gives the lessee the right to enter on certain lands to drill and operate gas and oil wells, reserving a certain royalty on the product of the wells and also a payment of \$100 rental yearly for each well from which gas is produced, and the lessee enters upon the land and drills three gas wells and pays the lessor the \$300 rental therefor stipulated in the lease, the lessee acquires thereby a vested interest in the land for the purposes named in the lease. Even if the lessee breaks the implied covenant in the lease to reasonably develop and operate the land for oil the lessor's remedy is not by way of forfeiture or cancellation of the lease.

Lafayette Gas Co. v. Kelsay, 164 Ind. 563, 74 N. E. 7 (1905). A lease granted the right to drill and operate for oil and gas on a certain described tract of land for six months and as much longer as oil or gas was found in paying quantities, paying a royalty to the lessor. Until a well was completed the lessor was to be paid 50 cents per acre per annum for the land, but the well was to be drilled within two years. After the completion of such well the lessor was to be paid \$100 per annum for each well on the land; in case no wells were drilled, the payment of this \$100 was to continue the lease in force as though the wells had been drilled. Held that, the lessor having accepted several annual payments of the \$100 to keep the lease in force, he could not, without notice to the lessee, suddenly declare the lease forfeited for failure to drill the additional wells. He had to give notice to the lessee of his intention not to accept any more rental payments in lieu of the development of the property, and the lessee was entitled to a reasonable time after such notice in which to explore the premises for oil. Where the lessor, instead of giving such notice, declares the lease terminated, he cannot insist upon the lessee's proceeding at once to develop the land, since he himself has prevented the lessee from proceeding under the lease.

Logansport & W. V. Gas Co. v. Seegar, 165 Ind. 1, 74 N. E. 500 (1905). In an oil and gas lease lessee agreed to sink a well within three months, or pay a fixed sum as rent until one should be sunk. No well was sunk, but the rental was paid until lessor finally refused to accept same on the ground that, the lessee not having developed the land, she wanted the lease canceled; no attempt was made to explore for gas or oil prior to the commencement of suit by the lessor to quiet title. Held, the refusal to accept the rent was the equivalent of notice by the lessor to lessee that she objected to any further delay in its beginning to explore or develop her land, and thereafter, under the implied obligation of the lease, it was required to proceed within a reasonable time to sink a well on the premises. Continued delay or refusal after such action was unreasonable, and, in the absence of lessee's showing any sufficient excuse therefor, lessor was justified in commencing this action.

Erie Crawford Oil Co. v. Meeks, 40 Ind. App. 156, 81 N. E. 518 (1907). The principal consideration in oil and gas leases is the development of the land and the anticipated profits resulting from the sale of the products. Hence a lessee cannot, over the objections of the lessor, refuse to develop the land, and by payment of the rentals provided retain control of the same and prevent its development. Where there is a fixed time within which operations must be completed, the lessee must act within that time, and where there is no fixed time the lessee has only a reasonable time to act, what is a reasonable time being for the jury.

Iowa.

Price v. Black, 126 Iowa, 304, 101 N. W. 1056 (1905). The stipulation in a mining lease to operate the mine in a good and workmanlike manner, as well as the obligation implied by law where there are royalties to be

paid to the lessor, impose upon the lessee the duty of reasonable effort and diligence in the operation of the mine. See this case also on page 233.

Kansas.

Mills v. Hartz, 77 Kan. 218, 94 Pac. 142 (1908). Under a lease of land for oil and gas purposes in which the lessee is given the exclusive right to mine for twenty years and as long thereafter as mineral is found in paying quantities, the consideration being a royalty on the product, it is the lessee's duty to begin development of the land within a reasonable time. Development of the land being the chief purpose of the lease, it was not contemplated that the lessor should wait twenty years for that development or for royalties. The lessee not having begun work within seven years, lessor had a right to treat the contract as abandoned.

Kentucky.

Berry v. Frisbie, 120 Ky. 337, 27 Ky. Law Rep. 724, 86 S. W. 558 (1905). In consideration of \$1, an instrument gave the right to enter upon the grantor's lands and prospect for oil and minerals, the grantees to have four months in which to accept the grant and two years thereafter in which to prospect for oil and minerals. If oil was found in paying quantities, the grantor was then to deed the oil and mineral privileges of the lands to the grantees, the grantees to pay a certain royalty on the oil and mineral products. Held that, after acceptance of the grant within the four months, the grantees were bound by this contract, within two years thereafter, to explore the land by actually sinking a well or wells upon it, and, if oil was found in paying quantities, to diligently operate the same so as promptly to yield the royalties to the grantor, and unless the grantee did so actually develop the land and in good faith and diligence operate it, the lease or contract should be deemed abandoned. In no event were the grantees entitled to the deed provided for in the contract until, as the result of such actual development within the life of the contract, oil or minerals were found in paying quantities.

Ohio.

Ohio Oil Co. v. Kelley, 9 Ohio Circ. Ct. R. 511, 3 Ohio Dec. 186 (1895). In consideration of \$1,650, H. granted to the company all the oil and gas in and under a tract of 165 acres, together with the right to enter thereon for the purpose of drilling and operating for oil, gas or water, and to erect necessary structures, etc., excepting and reserving one-sixth of the oil produced. "All wells to be drilled on said land are to be drilled within three years from this date and this contract shall expire within ten years from this date."

The lessee, who also controlled the oil rights upon adjoining land, drilled seven wells. Three years having expired, H. granted to K. the right to drill eight wells for oil on the tract of 165 acres.

Quoting *Wettengel v. Gormley* (vol. 1, p. 77) that a lease of oil and gas partakes of the character of a lease for general tillage, the court held that the instrument in this case was governed by the law applicable to the relation of landlord and tenant; that an implied obligation is created to operate the premises for the common good of both parties; that in these operations the lessee has a discretion to determine the number of wells it will drill to accomplish this object, but this discretion must be honestly exercised.

The court, therefore, refused to enjoin K. from drilling wells under his grant from H.

Harris v. Ohio Oil Co., 57 Ohio, 118, 48 N. E. 502 (1897). The party of the first part "granted, and demised and let unto the party of the second part for the purpose and with the exclusive right of drilling, operating for petroleum, oil and gas, all that certain tract, etc.," "to have and to hold the said premises for the said purpose only" for five years and as much longer as oil and gas are found in paying quantities. It was also provided that the failure to comply with the conditions or to pay the consideration, etc., should avoid the lease.

The lessor claiming that more wells should be drilled upon the land in order to develop it properly so notified the lessee who refused to comply. Thereupon lessor claimed that the lease was forfeited as to the undrilled parts and he was entitled to enter and drill wells thereon. The lessee had become the owner of adjoining lands which it was alleged were being operated to the disadvantage of the land in question.

Burket, C. J.: "Under an oil lease which is silent as to the number of wells to be drilled, there is an implied covenant that the lessee shall reasonably develop the lands, and reasonably protect the lines. The development and protection of lines which is thus implied when the lease is silent is such as is usually found in the same business of an ordinarily prudent man, neither the highest nor lowest, but about medium or average."

There is consequently such an implied covenant here, but the breach of the covenant "does not have the effect to forfeit the lease in whole or in part, nor is it good cause for a court to declare such forfeiture, unless the lease in express terms provided that a breach of such implied covenant shall avoid or forfeit the lease." The lessor's remedy is by action for breach of covenant.

Vendocia Oil & Gas Co. v. Robinson, 71 Ohio, 302, 73 N. E. 222, 104 Am. St. Rep. 773 (1905). A grant, in consideration of \$1, of all the oil and gas under certain premises, with the right to enter thereon for the purpose of drilling and operating for oil and gas, excepting and reserving to the grantor the one-sixth part of all the oil produced and saved from said premises, to be delivered in the pipe lines with which the grantee may connect his wells, implies an engagement by the lessee to develop the premises for oil and gas. The time within which the implied engagement must be performed is postponed by acceptance of the sum specified in the condition of such grant that, "in case no well is completed within 90 days

from date hereof, unavoidable delay excepted, then this grant shall become null and void, unless second party shall pay to first parties 25 cents an acre per year, payable by deposits at the * * * , or directly to the first party, after demand having first been made," and does not commence to run until the end of the year, for which payment is accepted, and the lease does not become null and void at the end of such year upon refusal of the grantor to accept the payment for another year.

Pennsylvania.

Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696 (1899). See this case on page 237.

Colgan v. Forest Oil Co., 194 Pa. 234, 45 Atl. 119, 74 Am. St. Rep. 695 (1899). Bill in equity for forfeiture of oil and gas lease or in the alternative for specific performance of implied covenant to drill wells for reasonable development of the land. The lease which was on royalty required lessee to complete one well within a year. Lessee drilled five wells, the product of which fell off greatly, owing, it was alleged, to operations on adjoining lands leased by the same lessee. The location of the five wells had been determined after consulting the lessor, but they were all on one-half of the premises.

"As the covenants are merely implied and their extent depends altogether on oral evidence of opinions, the case for relief is wholly wanting in that precision and certainty of contractual duty which is necessary to sustain the ordinary chancery decree for specific performance." The jurisdiction in *Kleppner v. Lemon*, 176 Pa. 502, 35 Atl. 109, was on the ground of fraud.

"There is no relation of special trust or confidence between lessor and lessee in gas or oil leases, any more than in any other. Like all other contracting parties they deal at arms' length each for his own interest. So long as the question is one of business judgment and management, the lessee is not bound to work unprofitably to himself for the profit of the lessor, and the parties must be left, as in other cases, to their own ways. It is only when a manifestly fraudulent use of opportunities and control is shown that courts are authorized to interfere." The practical test is found in the question, are the outside wells draining the wells on the leased premises to such an extent that if the former were operated by a stranger the lessee would find it good management to sink another well to save the leased territory from exhaustion. If so, good faith requires him to do so. "Nor is the lessee bound in case of difference of judgment to surrender his lease, even pro tanto and allow the lessor to experiment. Lessees who have bound themselves by covenants to develop a tract, and have entered and produced oil, have a vested estate in the land which cannot be taken away on any mere difference of judgment."

Young v. Forest Oil Co., 194 Pa. 243, 45 Atl. 121 (1899), reversing *Young v. Vandegrift*, 30 Pittsb. Leg. J. (N. S.) 39. Bill to declare forfeiture of lease for failure to develop land and for damages for draining wells on neighboring lands, or for specific performance of implied covenant

by sinking additional wells. *Colgan v. Forest Oil Co.*, followed. The decision in *Kleppner v. Lemon* "rested on fraud alleged and proved and fraud in fact, not merely inferred from a difference of judgment between the defendant and the court as to the profitable development of the leased premises." "The operator who has assumed the obligations of the lease, has put his money and labor into the undertaking, and is now called upon to determine whether it will pay to spend some thousands of dollars more in sinking another well to increase the production of the tract, is entitled to follow his own judgment. If that is exercised in good faith, a different opinion by the lessor, or the experts, or the court, or all combined, is of no consequence and will not authorize a decree interfering with him."

Adams v. Stage, 18 Pa. Super. Ct. 308 (1901). It is an implied condition of every lease of land for the production of oil therefrom that when the existence of oil in paying quantities is made apparent, the lessee shall put down so many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee; but he is not bound to put down more wells than are reasonably necessary to obtain the oil of his lessor, nor to put down wells that will not be able to produce oil sufficient to justify the expenditure.

Where a lessee drills one well on the leased premises, which yields from one to two and one-half barrels per day, and he drills wells on various adjoining leaseholds which he owns, none of which, however, are good producing wells, and there is no evidence to show that he acted in bad faith in drilling these wells, or in failing to drill other wells on the lessor's premises, he is not liable to account to the lessor for royalties on oil produced from wells on the adjoining leaseholds.

"In the present case the advisability of drilling additional wells upon the land of plaintiff was a question involving business judgment and management, the lessee was not bound to work unprofitably to himself for the benefit of the lessor, and the question of further exploration was primarily to be determined by him who would have to foot the bill. If the judgment of the defendant was exercised in good faith and involved no manifestly fraudulent use of opportunities, we cannot say that he failed to discharge any duty to the plaintiff arising out of his contract and the operations thereunder. If there was no failure in duty there is no obligation to account." (*Colgan v. Forest Oil Co.*, 194 Pa. 234, 45 Atl. 119, 75 Am. St. Rep. 695.)

Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 Atl. 801 (1907). Defendant was lessee of plaintiff for oil and gas purposes. He sunk a well on his land close to the dividing line and obtained gas in paying quantities. On plaintiff's land he sunk a well near the line but 1,350 feet away from the first well. This one was not productive. It being found that the location of the first well was not made with intent to fraudulently deprive plaintiff of his rights, a bill for an injunction and accounting was dismissed.

South Carolina.

National Light & Thorium Co. v. Alexander, 80 S. C. 10, 61 S. E. 214 (1907). Even where there are no words expressly binding the operation of the mine and the quantity to be taken out by the lessee, a covenant to mine will be implied and the lessee required to operate the mine within a reasonable time, and to dig such quantity of ore as must be inferred to have been within the reasonable contemplation of the parties. "Where by the terms of the lease the sole compensation to the lessor is a share of what is produced, there is an implied covenant for diligent search and operation."

Texas.

J. M. Guffey Petroleum Co. v. Oliver, 79 S. W. 884 (1904). A lease giving the lessee the right to prospect for oil and gas and to operate the premises therefor, executed in consideration of royalties reserved, though silent as to the extent of development required, contains a condition implied by law for diligent, bona fide, and reasonable development, for breach of which the lessor may declare a forfeiture of the lease.

J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co., 48 Tex. Civ. App. 555, 107 S. W. 609 (1908). A lessee of oil lands having agreed to develop the land and pay royalties, subsequently, in view of the low price of oil and poor storage facilities, made a new contract with lessor to operate the only well then on the premises, and limiting the output to about one-seventh of its capacity. Held this later contract limited the output from the whole property to that of the one well designated, and the lessor thereby waived the right to require the lessee to produce a larger amount, unless to protect the property from drainage by wells on adjoining lands. While the original lease contract did not specify the number of wells that lessee should sink upon the property, and did not expressly require the sinking of offset wells to protect the land from drainage, from the nature of the contract an implied obligation rested upon the lessee to use reasonable diligence and care to develop and protect the property, and this obligation required it to sink as many wells as the exercise of such diligence and care would suggest under the circumstances; but such diligence would not require that additional wells be sunk for the purpose of increasing the production of oil after the lessor had agreed that the amount of production could be limited to less than one-seventh of the amount which the well on the property was capable of producing.

Virginia.

Shenandoah Land & Anthracite Coal Co. v. Hise, 92 Va. 238, 23 S. E. 303 (1895). By writing under seal the owner of land assigned to another all his right, title and interest for the term of 99 years to all minerals that might be found on the land "to farm," together with "the right of way," the only consideration being a share of the profits from the mineral mined.

This instrument was denominated by the court a "mining lease," and conferred only the usual mining rights, which it was the lessee's duty to exercise within a reasonable time, and in a way calculated to benefit the lessor as well as himself. The lessee and his assigns having done practically nothing in furtherance of the object of the lease for 40 years, it was annulled.

"It is true there is no covenant in the agreement on the part of N. to mine the minerals; but to give effect to the agreement it must be held that the acceptance of it by N. amounted to an agreement on his part to mine the minerals to be found on the property, and within a reasonable time, otherwise the agreement might prove entirely fruitless to S. and those claiming under him. *Caldwell v. Fulton* and *Grubb v. Bayard*. It has been maintained as elementary law, by decisions of this court, as well as by the courts of other states, that an agreement to do something other than to pay money, no time being expressed, means a promise to do it within a reasonable time."

West Virginia.

Harness v. Eastern Oil Co., 49 W. Va. 232, 38 S. E. 662 (1901). Lessors' remedy for failure on the part of lessee to further develop the leased premises, or to properly protect the lines thereof from drainage through wells on adjacent property, is ordinarily by an action at law for damages. See this case also on page 91.

Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027 (1903). Under some circumstances of delay or fraudulent evasion of the duty of development, equity will cancel an oil lease, even if there be no express clause of forfeiture, as development is regarded as the real intent of the lessor.

Talbott v. Southern Oil Co., 60 W. Va. 423, 55 S. E. 1009 (1906). "If an oil lease may be said to confer only a license, the licensee is liable for all injury resulting from the negligent exercise of the powers conferred upon him." Hence an action lies where a lessee drills and then abandons a well, from which natural gas escapes, and the lessor may recover for the injury to the land. "Waste, injury to the freehold, by a tenant for life or years, is actionable at common law, whether it result from affirmative wrongful acts, or mere omission to perform duty."

Wyoming.

Phillips v. Hamilton, 17 Wyo. 41, 95 Pac. 846 (1908). See this case on page 228.

*B. Covenants to Work Mines.**(a) Covenants Simply to Mine.*

p. 105, 106.

Colorado.

Clear Creek Leasing, Min. & Mill. Co. v. Comstock Gold & Silver Min. & Mill. Co., 68 Pac. 1060 (1902). Where a mine is leased for the purpose of mining, and the lessee covenants to "work the same continuously and with reasonable diligence," and also to do 100 feet of development work during the second six months of his lease, with a provision for forfeiture in case of default, the lessor may declare a forfeiture at the end of the first six months, because the lessee had done nothing after the first four months of the lease except pump water from the mine. "The property was leased for mining purposes. Ore was to be extracted, and out of its proceeds certain royalties paid to the lessor. Pumping water is not extracting ore. In connection with mining operations, it might be profitable work, but alone it would never produce a dividend." The special covenant to do a certain amount of work after the first six months does not obviate the necessity for "continuous work" during the first six months.

Kentucky.

Ross v. Sheldon, 119 S. W. 225 (1909). A lease of coal lands on royalty for twenty years contained, among other covenants of the lessee, the provision that operations should begin within ten days and be planned and worked so as to produce all the coal possible, and that the main entry should be driven at the rate of sixty feet per month. The fact that there was no forfeiture clause nor penalty provided for the breach of these covenants did not relieve the lessee from the obligation to reasonably comply with them; but time was not of the essence of the contract, and the failure to drive the entry as provided, which at the start was impracticable and later was excused by the illness of the lessee and stringency in the money market, was not a ground for cancellation.

(b) Covenants to Mine a Certain Amount.

p. 108.

Colorado.

Macon v. Troicbridge, 38 Colo. 330, 87 Pac. 1147 (1906). Where lessee of mining property agrees to work and develop the premises in a miner-like fashion, and in a manner conformable to good and economical mining and so as to take out the greatest possible amount of ore, to work at the mine continuously, and pay a certain royalty, and the lease provides for forfeiture in case of failure to do a fixed amount of work monthly, such

lease obligates the lessee to work the mine as agreed so long as in his possession, or pay damages for his failure, the damages to be measured by the amount of ore that could have been mined, its value and the possibility of operating the mine at a reasonable profit.

Iowa.

Wilson v. Big Joe Block Coal Co., 134 Iowa, 594, 112 N. W. 89 (1907). A coal mining lease stipulated that lessees would mine not less than 8,000 tons of coal annually and in any event pay a minimum royalty unless "prevented from taking out said coal on account of any matters that they cannot avoid." The mine was undeveloped and remained so, lessees alleging "that the failure to produce coal was owing to no neglect or want of due effort on its part but that in opening the mine the coal deposit was found to be in such a defective condition and the natural difficulties to be overcome were so great as to render the operation of the mine impracticable." Held that not only was the physical impracticability of mining to be considered in this case, but also that the mine could not be worked with profit, for, the mine being unopened, it was clearly not the intention of the parties that it be operated at a loss. Furthermore, there was the obligation in the lease that operations by the lessees should continue until all the coal underlying the premises be removed. The lessees have done all they are bound to do when they have removed all such mineral as can be reached by the reasonable expenditure of money and labor according to approved methods among practical miners in that territory.

Pennsylvania.

West Ridge Coal Co. v. Von Storch, 5 Lack. Leg. N. 189 (1899). Under a clause relieving the lessee of a mine of liability for the minimum during the time necessary to overcome a fault, he will not be excused when one has been encountered if the minimum could be produced from other parts of the property, taking into consideration the state of the mining operations at the time and his ability to make them immediately available to produce the minimum; in other words, the encountering of a fault only relieves pro tanto; the lessee must still mine the minimum if he can. The burden is upon him to establish that he could not do so. If one coal vein is apparently sufficient to produce the minimum itself, the lessee would not be bound to anticipate a fault in it so as to have other veins on the property in immediate readiness in case one was met; reasonable foresight and diligence are all that is to be expected of him. But where two veins are manifestly necessary for the production of the minimum, both ought to be ready, and the disabling of one of them excuses the lessee only to that extent.

Troxell v. Anderson Coal Min. Co., 213 Pa. 475, 62 Atl. 1083 (1906). Where a coal lease provides for the mining of a stated number of tons of coal per year, and the payment of royalty thereon whether the coal is mined or not "unless prevented by faults in the strata unforeseen," the

lessor will not be prevented from recovering the minimum royalties for the first year, because the lessee in attempting to reach the coal from an adjoining mine was prevented from doing so by faults in the strata of that mine. See this case also on page 162, below.

Homet v. Singer, 35 Pa. Super. Ct. 491 (1908). The lessee of a quarry for the term of ten years agreed to remove "an average of 40 carloads of salable stone per annum." A forfeiture could not be declared because of a failure to take out 40 tons during each of the first and second years, when the lessee was continuously working the quarry and there was no pretense of abandonment.

Virginia.

Oglesby's Ex'x v. Hughes, 96 Va. 115, 30 S. E. 439 (1898). O. leased to H. for ten years the right to mine iron ore upon two tracts of land for a royalty of 25 cents per ton for all ore mined, the lessee to remove not less than an average of 12,000. H. was to pay and did pay \$3,000 in advance to be reimbursed by the royalties on the first 12,000 tons taken out. In less than 16 months lessor filed a bill charging that the lessees were tenants at will, declaring his purpose to terminate the lease, and asking for an account of ores taken out, etc. Lessee filed an answer and cross bill admitting the lease to be an estate at will. The parties having agreed in the pleadings that the lease was an estate at will, it will be so treated by the court. The contract did not require that the lessee should take out 12,000 tons each year, but only contemplated that the amount removed during ten years should average 12,000 per year. The lessee having complied with and not having violated any of the terms of his agreement, and the lease having been terminated by the lessor, without fault on the part of the lessee, before he had taken out sufficient ore to reimburse him the amount advanced on account of royalties, his executor was entitled to recover from the lessor the amount so advanced and the royalty on the ore actually removed.

(c) *Covenants to Sink Wells and Conduct Oil and Gas Operations.*

p. 110. The lessee is bound by his covenants to sink wells to the number and in the manner stipulated. His obligation to do so is absolute and performance is not excused by the fact that the supply of oil or gas may not be or is not adequate to require complete performance, not by the fact that his operations may be injuriously affected thereby. (But see *Duff v. Bailey*, 29 Ky. Law Rep. 919, 96 S. W. 577, and *Baumgardner v. Browning*, 12 Ohio Circ. Ct. R. 73, below.) On the other hand, where the lessee has performed his express covenant to drill wells, if in doing so oil or gas is produced, it then becomes his duty to proceed with the

operations diligently to the end that there may be a proper and reasonable development of the land. (See page 116.) Even where the lease contains an alternative provision for the payment of a rental until work is commenced or a well drilled, the lessee owes the duty of development of the land. He will not be permitted to hold it for speculative or other purposes for an unreasonable length of time at a nominal rent. The production of revenue is always the chief object of an oil and gas lease.

Such provisions for the payment of fixed sums for delay in the beginning of work are generally construed to be liquidated damages and not penalties.

Where, however, there is no provision in the lease in the nature of liquidated damages for default in performance, the lessor is entitled to recover damages actually sustained, resulting from the breach. (On the subject of the measure of damages in such an action, see vol. 1, page 110, and *Iddings v. Equitable Gas Co.*, below.)

In addition to the following cases, see, also, cases under Chap. IV, Div. II, D. and E.

United States.

Kellar v. Craig, 61 C. C. A. 366, 126 Fed. 630 (1903). 4th Circ. Where a lease provides that the lessees shall drill one well every two months until the land demised is well developed, equity will not decree a forfeiture of the lease where the lessees have drilled the stipulated number of wells, although not at regular intervals of two months, especially when the lessor acquiesced in the lessees' work at the time they drilled the wells.

Indiana.

Indiana Natural Gas & Oil Co. v. Hinton, 159 Ind. 398, 64 N. E. 224 (1902). A gas lease provided that the lessees should drill a well within twelve months from July 25th, 1890, or failing to do so, pay the lessor \$56 yearly as rent. Also that the lessees should furnish gas to heat and light the dwellings on the premises demised on or before November 15th, 1889. Held that these two covenants may have been inconsistent, but both were lawful, and they were independent of each other. The lessees, therefore, are liable for a breach of the agreement to furnish gas by the time specified to heat and light the dwellings on the land. Had the lessees drilled a well before November 15th, 1889, and had no gas been found, a different question would have been presented.

Manhattan Oil Co. v. Carrell, 164 Ind. 526, 73 N. E. 1084 (1905). An oil and gas lease provided that, after the completion of the first well, the

lessee was to drill one well each 90 days until five wells were completed, if oil was found in paying quantities; in case any such additional well was not completed within 90 days of the preceding well, the lessee was to pay to the lessor \$30 for each 30 days' delay in completing said well. In an action to recover the penalty of \$30, held that, by the phrase in the lease "if oil was found in paying quantities," it was not meant that if oil was found in the test or first well in a sufficient quantity to pay a profit, however small, in excess of the cost of producing it, excluding the cost of drilling the well and of equipment, the lessee would be required to drill the additional wells, even though it became manifest that the oil to be obtained would not repay first cost, and the enterprise, as a whole, result in a loss to the lessee. The additional wells were to be drilled only in the event that oil was found in such quantity as would, taken in connection with other present conditions, induce ordinarily prudent persons engaged in like business to expect a reasonable profit on the full sum required to be expended in the prosecution of the enterprise. And whether or not oil was found in paying quantities is to be determined exclusively by the lessee, acting in good faith and upon his honest judgment.

Jones v. Mount, 166 Ind. 570, 77 N. E. 1089 (1906). An oil lease of a tract of 80 acres bound the lessee to drill eight wells and further provided that "on failure to drill any of these wells within the specified time the second party (lessee) shall surrender the right to drill on all of this grant excepting 10 acres for each well drilled." The lessee drilled but one well, and on suit by the lessor to recover 70 acres, it was held that he could not recover "because the provision concerning a surrender is so far uncertain that it cannot be said that the failure to drill the remaining 7 wells per se entitled him to all or to any particular portion of the real estate." The burden is upon the lessee to select the ten acres upon demand of the lessor in a reasonable manner in view of the interest of both parties, and in case of failure so to do, the court will make the selection.

Ramage v. Wilson, 37 Ind. App. 532, 77 N. E. 368 (1906). An oil and gas lease provided that the lessee should drill a well within 15 months, and an additional well each and every 60 days thereafter, "or pay \$1 per day for each and every day's delay over that time till three wells are completed," and also gave him the right "to cancel and annul this contract or any part thereof at any time." Upon suit being brought for failure to drill the third well, defendant set up that he had canceled the contract as to one-third of the tract. Held that his contention that it was understood that the lease could be canceled as to one-third of the tract for each well not drilled was bad, because the tract was leased as an entirety, because it was not shown from what part of the tract such one-third was to be taken, or that the parties ever agreed on a division for such purposes. The cancellation clause being ambiguous, the court will look to the nature of the lease and the evident intention of the parties.

Dill v. Frazee, 169 Ind. 53, 79 N. E. 971 (1907), reversing 77 N. E. 1147. An oil and gas lease provided that in case no well was completed within 60 days, the grant was to be void, unless the lessee paid at the rate of \$40

for each year of delay in the commencement of operations. It was held that the lessor might compel the development of the land, and in case of failure to develop, declare a forfeiture of the lease. The payment for delay was due in advance, otherwise the lessor might have his land idle for a year without return; for the lease not creating the ordinary relation of landlord and tenant, no action can be maintained for use and occupation.

Scott v. LaFayette Gas Co., 42 Ind. App. 614, 86 N. E. 495 (1908). An oil and gas lease required the lessee to drill one well within two years, and also a second unless the first became useless, and also provided that in case the wells were not drilled or utilized, then the agreement should continue upon the payment of rentals for the wells, and have the same force and effect as though the wells had been drilled. While this latter provision was optional in form, it did not permit the lessee to refuse either to drill wells or to pay the rental and thus entirely avoid the contract. Lessee obligated himself either to drill or pay and upon failure to drill became liable to pay the rent.

Dailcy v. Heller, 41 Ind. App. 379, 81 N. E. 219 (1908). An oil and gas lease provided that in case no well were completed within 60 days, then the grant should be null and void, unless lessee should pay \$1 in advance for each day thereafter completion was delayed; further that lessee should drill wells at the rate of one every 60 days until 5 were completed, but in case any well were not completed in the said 60 days, lessee should pay \$1 per day in advance until said well was completed. Two wells were completed in 120 days. Held, the \$1 payment attached to each of the three delayed wells for the days each was delayed. "The lease means that one well shall be drilled within 60 days from the date of the lease and another within 120 days from that date, and not within 60 days from the completion of the first well."

Kansas.

Collier v. Monger, 75 Kan. 550, 89 Pac. 1011 (1907). There is a distinction between drilling a well and completing a well, and when one contracts to drill a well for oil or gas in a good workmanlike manner, that does not include placing the well in a complete condition for permanent preservation by placing therein a packer and tubing and removing salt water therefrom.

Davidson v. Hughes, 76 Kan. 247, 91 Pac. 913 (1907). The lessees of an oil and gas lease agreed "to commence drilling a well on the land, one well in three months, two additional within one year from the above date. If said lessees fail to complete three wells within twelve months as above provided, then and in that case said lessees agree to pay \$500 as forfeit to said lessors at the expiration of that time." On lessees' failure to perform, suit was brought for the forfeit, which was held to be liquidated damages and not a penalty. The consideration for the contract was \$1, but the real inducement for the contract was the completion of three wells

in a year which might result in great profit, failure to perform possibly resulting in great loss. The extent of such damage could only be conjectural, and would be difficult, if not impossible, of specific pleading or proof. Hence the \$500 was agreed upon by the parties as liquidated damages in case of default by lessees, and lessor was not bound to show specific damages to recover.

Kentucky.

Duff v. Bailey, 29 Ky. Law Rep. 919, 96 S. W. 577 (1906). In an agreement for the exploration of land for oil and gas by drilling a well or wells thereon, it was provided that work should be begun within three months and prosecuted diligently. The lessee by drilling on adjoining land became satisfied that there was no oil or gas in the territory. It was held that the lessor could not maintain a suit for damages for failure to drill a well unless he conclusively established that oil or gas would have been produced by such drilling.

Monarch Oil & Gas Co. v. Richardson, 30 Ky. Law Rep. 824, 90 S. W. 668 (1907). In an oil and gas lease providing that lessee dig a well within a fixed time or pay an annual rental, development of the land and royalties being the chief object of the execution of the lease, the lessor will be so far protected that the lessee will not be permitted to hold the land for speculative or other purposes an unreasonable time for a nominal rent. But the lessor cannot demand a forfeiture so long as he accepts the rental for the delay in working the land; he must give notice that he will not accept the rent and will call upon lessee to develop the land within the fixed period. If lessee does not then act, his lease is forfeited.

Kimball Oil Co. v. Kecton, 31 Ky. Law Rep. 146, 101 S. W. 887 (1907). Oil company leased two adjoining tracts belonging to father and son, both leases providing for commencement of operations within a fixed time, the lease with the son stating that work on his land was to be begun after completing the well on the father's land. No work was done on the father's land and upon suit by him to cancel the lease the company set up that it was its intention to operate both tracts as one and that it had already put down wells on the son's land. Inasmuch as each was to receive royalty from the product of his own land only, by sinking a well on the son's land and none on the father's, the latter was deprived of all royalty, and this was contrary to the intention of the clause "a failure to commence operations renders this lease null and void." The lease was consequently avoided.

Flanagan v. Marsh, 32 Ky. Law Rep. 184, 105 S. W. 424 (1907). Under an oil and gas lease the lessees agreed to commence operations within one year, or in lieu thereof to pay \$25 per annum until work is commenced. Though demand was made upon one of the lessees to begin work, none was done. Held, the fluctuating and uncertain character and value of this class of property renders it necessary for the protection of the lessor that the properties leased should be developed as speedily as possible. and

the lessee will not be permitted to hold the land for speculative or other purposes an unreasonable length of time for a mere nominal rent, when a royalty on the product is the chief object in the execution of the lease. This would be even more true where the rental had not been paid.

Louisiana.

Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate, 115 La. 107, 38 So. 932 (1905). In an oil and gas lease for the term of ten years, the consideration of which was one dollar and one-eighth of the product, it was provided that the lessee should begin to explore for oil within six months or should pay \$50 each quarter in advance until a well was completed. There was no express provision for forfeiture, but the lessee was given the right to surrender the lease at any time upon the payment of \$100. The lessor contended that because the lessee was not bound to drill for oil and because the consideration was inconsiderable, the contract lacked mutuality and was void. The court held otherwise. The provision was to drill within six months or pay a liquidated rental and the stipulation for mere delay in its execution could not operate to discharge the obligation. If oil be found, the lessee must drill within ten years or render itself liable to an action for damages. The contract was not void for want of consideration, which may be inconsiderable without being insufficient. See *Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co.*, 119 La. 793, on page 84, above.

Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906). Where, in an oil and gas lease, it is stipulated that lessee shall complete one well within one year or pay at the rate of \$4 quarterly in advance for each additional three months such completion is delayed, and it is expressly declared that the contract is made "for the sole and exclusive purpose of mining and operating for oil and gas," and it is otherwise manifest from the instrument as a whole that the intention of the parties was not that the lessee should have the right to simply hold the land during the term of the lease, not exploring it himself for oil and gas, and not allowing any one else to do so, but that he should be bound to complete a well within one year, the obligation to pay \$4 quarterly will be held to be a mere penal clause and not an alternative obligation, and the making of such payments will be held not to be a fulfillment of the principal contract, in whole or in part, but merely the payment of liquidated damages.

Under the civil law the consideration of a contract must be serious, and \$1 is not so regarded. Therefore, in a lease naming \$1 as the consideration, the obligation to complete one well in one year is purely potestative and makes the contract a nullity, especially where lessee has the option at any time to annul the contract upon the payment of \$2, not a serious consideration under the Civil Code.

New York.

Laue v. Gordon, 18 App. Div. 438, 46 N. Y. Supp. 57 (1897). In an action to try title to oil and gas lands, defendant claimed under a lease, which provided that it should be null and void, unless the lessee should within five days commence and "prosecute with due diligence, unavoidable accidents excepted, the sinking or boring of one well" to a prescribed depth, unless oil in paying quantities was sooner found, and that said well should be completed in 90 days "unavoidable accidents excepted." Plaintiff, claiming under a subsequent conveyance from the same grantor, relied upon the forfeiture of defendant's lease. Held the defendant, having commenced a well within five days, was entitled to reasonable time in which to obtain the necessary materials for the rig and for the further preparations essential to carry forward the work, and whether the work was prosecuted with due diligence was a question for the jury.

Ohio.

Baumgardner v. Browning, 12 Ohio Circ. Ct. R. 73 (1896). A. leased land to B. for 20 years for the purpose and with the exclusive right of drilling for oil and gas for a consideration of \$500 and a royalty on the product. Lessee agreed to complete a well within six months and that failure to do so should avoid the lease. The business of oil drilling in this county was in a nascent state, and lessee, having sunk a well to the usual depth of wells as then sunk, found no oil; the well was then closed and the drilling apparatus taken away and nothing further done by lessee for two years.

It was held that, while it was the rule when oil had been found that it was the duty of the lessee to proceed diligently and make a fair use of the premises in the producing of oil, yet under the circumstances of this case the lessee was not bound to go forward and sink other wells at a considerable expense, not knowing whether he could obtain any oil or not in the search, but he had a right, at least for some time, to see what the developments were in the vicinity.

Subsequent lessees of A. subject to the lease of B. were therefore enjoined from operating the land for oil, and were required to account to B. for oil taken out by them.

Baldwin v. Ohio Oil Co., 13 Ohio Cir. Ct. R. 519 (1896). A lease granted all the oil and gas in and under a tract of about 100 acres. It provided that if no well was completed within three months, the grant should be void; that the lessor should receive \$100 for each well as soon as the well was located; that all wells should be completed within 18 months and no well should occupy more than one acre.

This did not mean that the lessee should have sunk a well on each acre within 18 months. He cannot sink additional wells after the expiration of 18 months without lessor's permission, but with that permission he may.

The lessor may not declare a forfeiture where the lessee has developed and operated the land, although he may not have developed it to its full capacity.

Duffield v. Russell, 19 Ohio Cir. Ct. R. 266, 10 O. C. D. 472 (1899). An oil and gas lease provided that the lessee should commence operations within 60 days from the date of the lease; in case of failure therein, the lessor could, by proper notice given, cancel the lease. On the 60th day the lessee staked the well, made a contract to purchase the necessary timber for the purpose of building a drilling rig for the well, and cut part of the timber. He intended, in good faith, to continue operations and perform his contract. Held that this amounted to a commencement of operations within the meaning of the lease, and that therefore the lessor could not declare a cancellation of the lease.

Kenton Gas & Electric Co. v. Orwick, 21 Ohio Cir. Ct. R. 274, 10 O. C. D. 786 (1900). An oil and gas lease provided that the lessee should pay \$100 per year for the product of each well while the same was being used off the premises. A well was to be completed in ten months from the date of the lease; upon failure to do so the lease was to become null and void, unless upon payment of \$1 per acre for each year that such completion was delayed. Held that "if the first well proved a good one and yielded gas that could be used off the premises, there was an implied contract to make a second well and a sufficient number of wells to reasonably develop the whole land, ninety acres. There is no reasonable inference of obligation to drill additional wells unless the land proved to be productive of gas that could be utilized off the premises; in short the lease was of productive oil or gas lands, and not of unproductive lands; and if the lands in question proved not to be oil or gas land, there was nothing in the contract or lease that would require the lessee to drill a second well or pay rent for any well."

Where the parties to such lease entered at the end of a year into a supplemental contract, in which the lessee, having paid \$90 for failure to drill a well, agreed to drill such well "as soon as it can be done," and that "the second well" would be put down within six months from the completion of the first well or the lessee pay rental from that date for the second well, "the second well" thus referred to was intended by the parties to mean the second well impliedly required to be drilled by the terms of the original lease. This was not a new and independent contract absolutely requiring a second well, without regard to the developments made by the first well as to whether or not the land was gas land. The fact, therefore, that the first well was a failure, and the land nonproductive gas land, would defeat the lessor's right to claim rental for the second well. If the land was not gas bearing and gas productive, there was no requirement on the lessee to make a second well at all, or, if made and it did not yield gas to be used off the premises, there was no requirement in the lease or leases that the lessee pay rental therefor at all.

Coffinberry v. Sun Oil Co., 68 Ohio, 488, 67 N. E. 1069 (1903). A petition filed on or about January 8, 1901, alleged in substance that the plaintiff lessor, on or about May 29, 1890, executed a lease of a tract of 160 acres for a term of five years and as much longer as oil or gas should be found in paying quantities, whereby the lessee obtained the exclusive

right to produce oil and gas on the leased premises; that the lease provided that one well should be completed thereon within one year from the date of the lease, which condition had been complied with and a paying well completed; that the lessee covenanted that, if the first well should be a paying well, he would drill, as soon thereafter as he could reasonably do so, a sufficient number of wells to fully develop said lands, and deliver to the lessor one-sixth of all the oil produced therefrom; that the lessee after taking possession and completing the first well assigned the lease to the defendant, who took possession and drilled two additional wells, the three being in one corner of the premises, and also drilled two wells on one side thereof, all being paying wells, and completed prior to July, 1898; that the defendant had ever since refused and still refused to further drill and develop or test said lands for oil or gas, or permit the plaintiff lessor, or any one for him, to do so; that the defendant neglected to protect the exterior lines of the leased premises from several producing oil wells, already drilled and in operation on lands of other adjoining lands of the plaintiff; that to properly develop the leased premises at least 26 additional wells should be drilled thereon, which could have been done within three years from the date of the lease; and that owing to the migratory nature of oil, and the impossibility of proving the presence and amount of oil in the lands except by drilling, plaintiff has no adequate remedy at law. Such petition states a good cause of action for the cancellation of the lease as to the undrilled portion of the premises, and it is error to sustain a general demurrer thereto and dismiss the petition of the plaintiff.

Crown Oil Co. v. Probert, 28 Ohio Circ. Ct. R. 739 (1905). In an oil and gas lease the lessee was required to drill a well on the premises within 90 days, and two additional wells at intervals of 90 days from the completion of the first well, and it was provided that if lessee should fail to drill the wells or any of them he should forfeit and pay to lessor \$100 for each well not drilled. In case no wells were completed within 90 days of the execution of the contract, the lease to be void. Lessee drilled one well in 90 days, then abandoned, claiming the right to surrender the lease. On suit for the \$200, held there was no option in lessee to regard this lease as null and void and abandon it, thereby exonerating itself from liability for the \$200. Having performed that act which by the contract could have rendered it null and void if not performed, that stipulation was complied with. Moreover, the \$100 which the lessee covenanted to pay was stipulated damages for default and was not a penalty.

Pennsylvania.

Young v. Equitable Gas Co., 5 Pa. Super. Ct. 232, 41 Weekly Notes Cases. 24 (1897). A lease for the purpose of drilling and operating for oil and gas contained a covenant that the lessee should complete three wells within three months or in default pay a yearly rental for delay until the completion of the said wells. The consideration of the lease was \$200 per annum for each well, and the lessee had the right to surrender the lease at any time.

The lessee drilled but two wells and in an action for the penalty set up the defense that the drilling of a third well would cause the failure of the first and second. This was held not to be a good defense. "The action in the present case is based upon an express, absolute and unqualified covenant for the benefit of the plaintiff and he has a right to enforce it." "The fact that the sinking of a third well might impair the value of those already in operation and be useless expenditure of money does not affect the question at issue. The defendant may not be obliged to sink another well, and this action is not for the purpose of compelling that to be done. But a failure to perform that part of the agreement cannot operate to annul another substantial independent covenant." (See *Cochran v. Pew*, vol. 1, p. 98.)

Putterson v. Hausbeck, 8 Pa. Super. Ct. 36 (1898). An oil lease provided that the lessee should have the right at any time to remove all his property. Having abandoned the lease he could not be prevented from removing his machinery on the ground that he had not performed his covenant to complete the work of development. This was a wholly independent covenant.

Iddings v. Equitable Gas Co., 8 Pa. Super. Ct. 244 (1898). A gas lease bound the lessee to drill one well and gave him the right to sink others at his discretion. The rental was \$300 per annum for the first well so long as gas should be sold therefrom, and \$200 for each and every other well. After he had drilled two wells a supplemental agreement was entered into by which he agreed to drill a third at a reduced rental.

Held this was an absolute obligation to drill a third well, and did not depend upon the question whether an adequate supply of gas existed. Expert opinions on that subject were inadmissible.

Since the contract did not fix the amount to be paid for default, the lessee is bound to pay the actual damages. The only accurate test of the compensation to which the lessor was entitled could be reached only by performance. The defendant having by his default deprived the plaintiff of this test, the value placed on its success may properly be deemed *prima facie* the just measure of compensation.

"Here in the absence of evidence to the contrary, the jury may presume the yield of a marketable quantity of gas up to the commencement of the action, while this presumption may be rebutted by evidence, competent in law, be it expert or other testimony, to show that a third well would not have yielded the quantity of gas required by the contract to entitle the plaintiff to the stipulated rental."

Kleppner v. Lemon, 197 Pa. 430, 47 Atl. 353 (1900) ; *Id.*, 198 Pa. 581, 48 Atl. 483 (1901). Where a lessee, instead of drilling a well and operating the land in accordance with the lease, drills a well on adjoining property which he controls, in such a way as to drain the oil and gas from under the leased land, the measure of the lessor's damages is royalties on a portion of the oil produced through the well, ascertained by comparing it with the total production through the well in the same proportion as the lessee's land within the circle drained bears to the whole area of drainage, the oil producing capacity of every part of the area being the same.

In such a case the rule as to the wrongful confusion of goods should not be applied so as to give to the plaintiff royalties on all the oil produced through the well, it being possible approximately to determine the amount of oil drawn from the lessor's land.

McClay v. Western Pennsylvania Gas Co., 201 Pa. 197, 50 Atl. 978 (1902). A lessee of an oil and gas lease sublet the gas to a gas company stipulating that if oil should be struck the well should be turned over to the lessee. Oil was struck, but the lessee did not take the well, and the gas company continued operations. Subsequently, the lessor and the gas company entered into an agreement in writing. The lessor reduced the royalty on the gas in consideration of which reduction the gas company covenanted as follows: "Before finally abandoning the well said second party hereby agrees to fit up the same with pumping apparatus and test the capacity of it as an oil well. It is, however, distinctly understood that the said test shall not in any way bind said company to continue the operations at said well, but it shall have the option to either operate it for oil or entirely abandon it." Subsequently, the gas company abandoned the property without complying with its covenant. Held (1) that evidence was admissible as bearing upon the question of damages, as to the amount of oil found when the well was tendered to and not accepted by the lessee; (2) that it was admissible to show what would have been the cost of drilling a well at the time the gas company abandoned the property; (3) that the lessor was entitled to more than nominal damages if it should be determined that oil in paying quantities could have been found.

Texas.

Forney v. Ward, 25 Tex. Civ. App. 443, 62 S. W. 108 (1901). Where an oil lease provides that it shall become null and void if no well is begun within a specified time, the question as to whether certain labor constituted the "beginning" of a well within the meaning of a contract, considered in connection with testimony offered as to the general understanding among persons engaged in the business of boring oil wells as to when a well was begun, is a question of fact for the jury and not of law for the court.

West Virginia.

Ammons v. South Penn Oil Co., 47 W. Va. 610, 35 S. E. 1004 (1900). S. purchased of A. seven-eighths of the undivided one-half interest of A. in the oil in and under 243 acres of land, and paid \$300 cash therefor; and, as part of the terms and conditions of sale, S. was to begin to operate, mine and bore for oil and gas within and under said tract of land, free of cost to A., within 60 days, and complete one well thereon in one year, unavoidable delay and accidents excepted; and, if the oil be found thereon in paying quantities, then, after the said first well was completed thereon, S. should immediately commence and drill other wells thereon as should seem

necessary to protect the oil and gas in and under the said tract of land, and should also deliver as royalty to the credit of A., free of cost to him, the one-half of the one-eighth of all the oil produced and saved from the said land, in pipe lines or tanks, and pay to him the one-half of \$300 per year for the gas from each and every well drilled thereon, producing gas, the product from which should be marketed. Held that the remedy for violation of said conditions of the sale is not by way of forfeiture of the rights of S. to bore or drill for oil on the land or any part of it, but by an action for damages caused by such breach.

Wyoming.

Phillips v. Hamilton, 17 Wyo. 41, 95 Pac. 846 (1908). See this case on page 228.

(d) *Covenants as to Manner of Working the Mine and as to the Condition of the Mine.*

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C. *Duty and Covenants to Pay Taxes.*

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California.

Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 Pac. 483 (1909). See this case on page 68.

Illinois.

People v. Bell, 237 Ill. 332, 86 N. E. 593, 19 L. R. A. (N. S.) 746, 15 A. & E. Ann. Cas. 511 (1908). In Illinois a lease of unlimited duration granting the right to enter upon land and prospect for oil and gas, drill wells, erect structures, lay pipes, etc., is a lease of a "mining right" within the meaning of §§ 6 and 7 of the Mines and Miner's Act, Hurd's St. 1905, c. 94, p. 1399, relating to the taxation of mining rights separate from the land.

"A mine is an excavation in the earth for the purpose of obtaining minerals; an excavation, properly under ground, for the purpose of taking out some useful product. A mining right may properly be deemed a right to excavate in the earth for the purpose of obtaining minerals or other valuable products." Oil is a mineral within the meaning of the act.

Kansas.

Kansas Natural Gas Co. v. Board of Com'rs of County of Neosho, 75 Kan. 335, 89 Pac. 750 (1907). Chapter 244 of the Laws of 1897, providing for the taxation of mineral rights, only applies to cases where the right or title in the minerals in place has been severed from the right or title to the remainder of the land and has become vested in a person other than the one having the right or title to the remainder of the land. When there is such a severance of title, the right or title to the minerals

in place is taxable as real estate. The interest which amounts only to a license to enter and explore for oil and gas, and if oil or gas is found then to take it, is not taxable under this statute.

Kentucky.

Wolfe County v. Beckett, 127 Ky. 252, 32 Ky. Law Rep. 167, 105 S. W. 447 (1907). Section 4020, Ky. St. (1903), makes all property not exempted by the Constitution subject to taxation; § 4039 (1906), makes it the duty of all persons owning any mineral rights in the land of another, or any coal, oil or gas privileges by lease or otherwise, to list the same for taxation. Under these sections, one who holds a lease of land with the right to drill and operate for oil and gas for a fixed term, for a royalty to be paid to the lessor out of the product, owns such an interest as falls within the statutes, and is taxable, whether the lessee be resident or not. If the product when found vests in the lessee, then the interest is taxable, less such percentage of the product as is reserved for the lessor, who pays taxes on his interest.

Pennsylvania.

Berwind-White Coal Min. Co. v. Clearfield County, 18 Pa. Co. Ct. R. 545 (1896). Where the surface lands and the minerals thereunder have become vested in different owners, the municipal authorities are bound to levy their taxes according to the ownership and value of these divisions. Where such severance has not taken place the land should be assessed to the owner at a value which includes the underlying coal, but where the land is undeveloped, and it is not known whether it is underlaid with coal or not, or where the existence of mineral in the land is purely conjectural, it should not be considered in assessing the land. But if the owner has by agreement or conveyance severed the coal right from the surface, such coal right should be taxed even in the absence of proof of the existence of coal on the land. The mere severance is sufficient proof of its existence to justify its valuation and assessment.

Delaware & H. Canal Co. v. Von Storch, 196 Pa. 102, 46 Atl. 375 (1900). It was provided in a coal lease that the lessees should pay a stipulated rent "clear of and over and above all taxes and reprises which may be during said term imposed or assessed upon coal mined or unmined in or upon the hereby demised premises, and upon the surface of the lands thereby demised * * * and also pay and bear all such imposts, taxes and reprises." Held, the lessees were obliged to pay municipal assessments for the cost of a sewer.

Rockwell v. Keefer, 39 Pa. Super. Ct. 468 (1909) The owners of a large quantity of unseated land conveyed the same, reserving all of the petroleum oil, gas and minerals therein. The right to the minerals was properly assessed for taxes separately from the land.

Potter Gas Co. v. Dunshie, 42 Pa. Super. Ct. 457 (1910). The grantee, in a conveyance of all the petroleum, gas, etc., contained in a tract of land, in consideration of a cash payment and a reservation of one-eighth of the

oil, agreed to pay "all taxes assessed upon said premises." He went into physical and visible occupancy of the surface of the real estate over the entire tract and was held to be liable for all the taxes assessed not only against the underlying minerals, but against the surface of "the said premises," these words being held to refer to the whole property. This covenant to pay taxes ran with the land.

D. Rent and Royalty.

p. 117. A covenant to pay a minimum royalty is an absolute obligation to pay. Although the instrument reserving the royalty be a sale of the coal and the royalties paid amount to more than the royalty on all the mineral left in the ground as well as on that taken out, the lessee must continue to pay royalties at least to the amount of the minimum so long as he retains possession. The object of such a covenant is to insure diligence in mining, and if the lessee fails to mine a sufficient amount to produce the minimum royalty, he must nevertheless pay it so long as he mines, although the result may be that he pays twice or oftener for the same product.

In determining upon what royalty must be paid the conditions and circumstances existing at the time the lease was made must be taken into consideration. The lessee has the right to adopt new methods in mining and preparing the product for market, but if this results in diminishing the amount of mineral produced subject to royalty, or in diminishing the sizes paying a larger royalty and increasing the sizes paying a smaller royalty, as in the case of coal leases under which the royalty is graded according to the sizes of coal produced, an accounting will be compelled upon the basis of methods in use at the time of the execution of the lease.

In oil and gas leases there is frequently a provision for a return to the lessor, sometimes called rental for delay, which, while not actually a rent, is most conveniently considered under that title. These leases contain the provision that in case the lessee shall fail to sink wells or pay a fixed sum until the performance of that duty, the lease shall be void. With this provision a covenant to make such payment is sometimes coupled and sometimes not. These provisions are construed to be stipulated damages for the breach of the duty to develop the land. If there is a distinct covenant to pay, there is an obligation to pay and the lessor may

in an appropriate action recover the rental for delay. But if the lease does not contain such a covenant, there can be no recovery; the effect, then, of such a provision as the above, is to give the lessee the option to terminate the lease. (See, also, cases under "Covenants to sink wells, etc.," page 131, above, and "Forfeiture," page 200, below.)

It has been stated that when rent arises from a conveyance which passes a freehold estate in the minerals, it is not properly rent, but is purchase money of land. It is personal property. (See page 36, above, and vol. 1, p. 118.) Inconsistent with this view, however, is the conclusion reached in two recent cases in Pennsylvania (*Coolbaugh v. Lehigh & Wilkes-Barre Coal Co.*, 213 Pa. 28, 62 Atl. 94, 4 L. R. A. [N. S.] 207; *Gallagher v. Hicks*, 216 Pa. 243). In these cases, when all the coal was leased without limitation of time in consideration of a royalty, with provision for a minimum payment, it was held that the lessor had a continuing interest in the land, the reversion of the worked out space and the continuing contingency of a reversion arising from forfeiture. A sheriff's sale of this interest passed to the purchaser the right to the royalties, which it therefore seems are realty. The court bases its conclusion upon the decision in *Denniston v. Haddock*. But it is submitted that that case leads to no such conclusion, and the result is a departure from a plain and simple principle.

United States.

Malcomson v. Wappoo Mills, 86 Fed. 192 (1898). C. C. D. S. C. See this case in regard to lien of state of South Carolina for royalties on phosphates.

Central Trust Co. v. Berwind-White Coal Co., 95 Fed. 391 (1899). C. C. S. D. N. Y. In a coal lease it was mutually covenanted that there should be mined annually 300,000 tons and that of the royalties payable for the same \$20,000 should be paid to the mortgagee of the premises in quarterly payments "so long as coal to that amount is produced under this lease." This clause "was to prevent an obligation to pay if coal did not exist or had been exhausted, but not to relieve the lessee from his liability to pay a royalty if he wilfully and arbitrarily refused to mine."

Duffield v. Michaels, 42 C. C. A. 649, 102 Fed. 820 (1900). 4th Circ., reversing 97 Fed. 825. A lease for oil and gas purposes dated March 16, 1898, provided, "this lease shall be null and void, and no longer binding on either party, if a well is not completed on the premises within two months from this date, unless the lessee shall thereafter pay monthly

to lessor ten dollars per month for each month's delay in completing said well. * * * If operations are not commenced in thirty days from this date, ten dollars extra to be paid for the second month." Operations were not commenced in 30 days nor was a well completed in two months, but on May 24, 1898, the lessees paid \$10 on account of rental and the lessor accepted the same. Held that the lessor could not declare a forfeiture of the lease for nonpayment of rent and that a subsequent lease to other parties on June 21, 1898, without the consent of the first lessees, was void; the payment of \$10 was made in time, because there was no requirement that it be paid in advance, and it would be held to be on account of the delay in completing the well, and not for the failure to commence operations in time, because nonpayment of the sum due for the latter was not ground for forfeiture.

Sharp v. Behr, 117 Fed. 864 (1902). C. C. E. D. Pa. The owner of a garnet mine, leased to a tenant for twenty years on royalty, agrees to convey the same to the owners of adjacent garnet mines, receiving as part consideration for the agreement to convey a promise by the proposed grantees to pay him a royalty on all ore shipped from mines which they owned already, as well as from the mines on the grantor's premises, "if possession thereof be obtained by" the grantees. Held that "if" was equivalent to "when" or "provided," and expresses a condition, and that the grantor was entitled to no royalty on the ore shipped from the mine granted until the term of the lease had terminated and the grantees obtained possession.

Berwind-White Coal Min. Co. v. Martin, 60 C. C. A. 27, 124 Fed. 313 (1905), 3rd Circ., affirming *Martin v. Berwind-White Coal Min. Co.*, 114 Fed. 553 (1902). A lease for ten years gave the lessee the right to mine and dispose of all the coal in a certain vein underlying the land, the lessee covenanting to pay a royalty on all coal mined and shipped, to mine a minimum number of tons and to pay royalty on that amount whether mined or not. Lessee ceased operations after the first year, on the ground that there was an exhaustion of merchantable coal. In an action by the lessor for breach of contract, brought after the expiration of the term, it was found as a fact that the merchantable coal was not exhausted, and the court held the measure of damage was the minimum royalty provided for by the lease. The lessee was not entitled to any deduction for the coal which had not been mined. "The action is *assumpsit*, which according to the state [Penna.] practice covers debt and covenant. It was treated by the court below as in the nature of the latter and the stipulated annual installments of royalty as liquidated damages. It might equally stand as an action of debt, the obligation to pay being absolute, and the term ended; but whichever way it be taken, the result is the same, the defendant being bound to pay in accordance with the agreement."

Alabama.

Gaines v. Virginia & Alabama Coal Co., 124 Ala. 394, 27 So. 477 (1900). A coal lease provided that the lessee should mine and pay to the lessor a royalty for all the coal contained in the seam which could reasonably

be mined out, and at the expiration of the lease should pay for all the coal in said seam and on said land whether the same be mined or not. Held that, at the expiration of the lease, the lessee was not obliged to pay for all the coal actually in the seam, but that there must be allowed to him, in the account, such coal as might be made unmerchantable, in the ordinary process of mining, by becoming mixed with the soil, and such as might be required for supports for the roof, with such possibility of obstruction that might arise from what are known as "faults" or "rolls". The words in the lease "which can reasonably be mined out" apply to and qualify the entire contract. The rule would be different if one would undertake to pay royalty upon a given number of tons, irrespective of whether the coal could be mined reasonably or at all.

California.

Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304, 41 Pac. 1087 (1895). A. and B. leased a certain deposit of bituminous rock and a certain deposit of liquid asphaltum for a royalty of "50 cents per ton for each gross ton which he may have mined, taken or removed from said premises." The premises in which these deposits were contained were not owned by A. and B. in common, but each owned a part in severalty. B. sold her part to the lessee. Held that A. was entitled to royalty proportionate to the comparative value of his distinct part of the demised premises, without regard to which part of the premises the rock and asphaltum may be taken from. The royalty per ton of rock mined is but a mode of estimating the rent to be paid for the right to occupy exclusively the whole premises demised, and to mine any or all parts thereof at any time during the term at the election of the lessee.

Royalty was due on rock mined and not only on rock shipped. The words "taken or removed" were not used in the sense of transportation to market, but applied to the asphaltum which could be taken without mining. The royalty on the asphaltum only applied to that taken from the deposit described in the lease and not to liquid asphaltum extracted from the crude rock.

Colorado.

Maloney v. Love, 11 Colo. App. 288, 52 Pac. 1029 (1898). A mining lease provided for payment of specified royalties "on all net proceeds from all smelter and freight charges and mill returns on all ore, etc.," and also reserved an undivided one-fourth nonassessable interest in the lease "free from all expense whatever to parties of the first part, said one-fourth interest being the net proceeds from said ore taken from said lease." The term "net proceeds" in the last clause means the gross proceeds after deducting smelter and freight charges. The expense of mining was not to be deducted or charged against the lessor; such a construction is precluded by the use of the word "nonassessable."

Illinois.

Missouri & Illinois Coal Co. v. Reichert, 119 Ill. App. 148 (1905). In a suit to recover unpaid royalties due for coal mined, evidence showing the

number of bushels of coal contained in an acre of other land and the royalties received per acre upon another mining lease is inadmissible. "This is not a suit for a failure properly to work the mine or a failure to take out all the coal that ought to have been taken out," but a suit to recover unpaid balances. "Before a comparison of the output of another mine could be of any value upon the crucial issue in this case, it must be established much more clearly than is done in this record that all the material conditions and methods were similar."

Cantrall Co-operative Coal Co. v. Level, 139 Ill. App. 104 (1908). A coal mining lease provided for payment of royalty upon "all pea, nut, lump and egg coal mined of a merchantable quality." Held that "screenings" which were sold were included under these designations. "Whatever coal of a merchantable quality is, as the lease provides, 'mined' by appellant, is included in the general description of pea, nut, lump and egg coal."

Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N. E. 219 (1908), reversing 140 Ill. App. 147 (1908). An oil and gas lease for the term of five years, and as much longer as oil or gas is found in paying quantities, contained a covenant that a well should be drilled within one year, and a provision that, in case no well was completed within a year, the lessee should pay a fixed rental per year, "to be paid annually counting from the expiration of the said twelve months." The lessee was held not to be bound to pay rent for the first year, nor to pay in advance for the second year; he had all of the second year to make payment before being in default.

Indiana.

Indianapolis Gas Co. v. Teters, 15 Ind. App. 475, 44 N. E. 549 (1896). A lease of all the oil or gas in and under a tract of land "for the term of five years or so long as oil or gas is found upon the premises," besides provision for the payment for oil, provided that "should gas be found second party agrees to pay first party \$100 each year in advance for every well from which gas is used off the premises, commencing with the time gas is first transported off the premises and sold."

"This rental, whether one or more wells were drilled, was payable only so long as the appellant continued to take gas therefrom. If gas ceased to flow or it becomes impracticable to take gas therefrom, the appellant had a right to cease to take gas, and to detach its line from the well, and its liability for the payment of the rental would cease."

Brooks v. Kunkle, 24 Ind. App. 624, 57 N. E. 260 (1900). In a grant of all the oil, gas and other minerals in and under certain land, reserving to the grantor one-sixth part of all oil or other minerals produced and saved from the premises, there was a provision that if no well was completed within 90 days from the date of the grant, it should become null and void, unless the grantee shall pay to the grantor a certain sum each year thereafter the completion of such well was delayed. The grantee was to have the right to surrender the lease at any time by first paying the rental on the land to the date of such surrender. The grantee failed to enter and drill a

well or to pay any rent, and the grantor brought an action therefor. "No absolute obligation to drill a well or to do any act whatever was cast upon the party of the second part by the terms of the instrument which, by its language, is characterized both as a grant and as a lease, and which is referred to in the complaint as a lease. It was, by its terms, to be entirely optional with the party of the second part whether or not anything should ever be done by him by the way of use of the land; and, as no well was made, there arose no obligation to pay for oil or gas. * * *

There was no absolute requirement that the party of the second part should pay any rent, but the grant was to be void unless rent were paid."

Dorey's Estate v. Service, 30 Ind. App. 174, 65 N. E. 757 (1902). An oil and gas lease granted to the lessees the exclusive privilege of drilling for oil and gas for a period of five years, or so long as gas and oil should be found in paying quantities on the leased premises. The lessees were to pay the lessor a royalty of one-eighth of all oil produced, and \$50 per annum for each well from which gas in paying quantities should be found, and agreed to commence operations within one year, in case of a failure to do which they were to pay the lessor 25 cents per acre per annum for the leased land. The lessees failed to drill on the land, and the lessor brought suit for the 25 cents per acre per annum. The lessees contended that the lease created a tenancy for five years, and hence the rent was not due until the end of the term. Held that "it is clear, from the terms of the contract, that the parties contemplated the payment of the well rental annually, and it is equally clear that they contemplated the acreage rental in the same manner. As this was the manifest intention of the parties, as expressed in the contract, the court will give it that construction, and, in our judgment, it will not bear any other."

King v. Morristown Fuel & Light Co., 31 Ind. App. 476, 68 N. E. 310 (1903). Where a lease provides that the lessee is to have the right to drill for oil and gas as long as they are found in paying quantities, the lessor to be paid \$25 per year for the location of a well on the tract whether a well was thereon drilled or not, and \$25 per year for each well drilled on said land thereafter, and also to be furnished with gas for domestic purposes in his dwelling house, the consideration of such contract consists of the \$25 of money, and the use of the gas therein provided for, as an entirety; while the lessor continues in the use of the gas under the lease, a part of the consideration, he cannot recover possession of the leased premises because of the failure of the lessee to pay the \$25 rent provided for in the lease.

Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149 (1904). A contract for exploring for natural gas "granted and contracted" twenty square feet of a tract of forty acres, to be located by mutual agreement, for the purpose and with the exclusive right of putting down a gas well thereon. The consideration for the grant was the agreement of the grantee to deliver to the grantor, free of charge during the continuance of the contract, whatever natural gas was necessary for domestic use in his dwelling house, and in addition a rental of \$100 per annum for each pro-

ducing gas well drilled on the premises. There was a further agreement to pay \$20 per annum until a gas well should be put down. It was further covenanted that "this contract shall be deemed to commence at, and run from the date of signing hereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes, or whenever the second party (the gas company), or their assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of the date of its becoming due. And in the event of the termination hereof, for any cause, all rights and liabilities hereunder shall cease and terminate."

No well was sunk, but the rental for delay was paid for five years. In an action to recover this annual sum of \$20 for the subsequent years, it was held that such an action could be maintained upon the contract in question, and that the obligation to pay was not terminated by the failure to pay. "Such a provision is made for the security of the one who is to be benefited by a fulfillment of the promise, and not for the benefit of the one whose interest lies in the nonfulfillment. Such contracts are construed to mean that upon failure of the operator to pay the well rental, or the promised sum for delay in beginning operations, the landowner may elect to put an end to the contract and recover what is due him, or he may waive his right of forfeiture and allow the contract to run, and enforce payments as provided in that instrument. An operator will not be allowed to set up his own default or wrong in discharge of his obligation to a landowner to pay for what he has bought."

Indianapolis Gas Co. v. Pierce, 36 Ind. App. 573, 76 N. E. 173 (1905). P. leased to G., for the purpose of drilling and operating for oil and gas, a tract of forty acres, reserving twenty acres around the buildings on the premises, the boundaries of which were to be designated by the lessor. The lease was to continue for the term of five years; the consideration was one dollar per annum for each well, payments to begin sixty days after the completion of each well. It was provided that a well should be commenced and completed within six months, and that in case of failure the lessee should pay for delay one hundred dollars per annum within three months after the time for completion. This was held to be a valid condition, and no well having been drilled the lessor could maintain an action for rental for delay, and the lessee was not discharged from the obligation to pay rent by the fact that the boundaries of the reservation had not been designated by the lessor, he having pointed out a place where the first well might be sunk, and no request for a more definite designation having been made by the lessee.

Roberts v. Fort Wayne Gas Co., 40 Ind. App. 528, 82 N. E. 558 (1907). In an oil and gas lease for a fixed period and as much longer as oil and gas are found in paying quantities, the rental was, "if gas is found in sufficient quantities to market the same." \$100 per annum in advance for each and every gas well drilled on the premises. Four gas wells were sunk all of which produced gas in paying quantities at first, but ceased to later on.

held the rental, being based on the productiveness of the wells, ceased when gas in marketable quantities could no longer be obtained therefrom.

Indiana Natural Gas & Oil Co. v. Wilhelm, 86 N. E. 86 (1908). Under a gas lease by the terms of which payment of rent is to be made "if gas is found in sufficient quantities to market the same, and to be piped away from the premises to such a market," gas is so found whenever it is found or exists in any well drilled on the premises in such quantity that, taking into consideration the opportunity to sell it and the cost and expense attendant thereon, it could reasonably be sold at a profit to the lessee. The rental itself is to be considered as a part of the expense. If the well was already producing oil in marketable quantity, the cost of drilling the well is not to be added, but merely the cost of operating and marketing, plus the rental.

Iowa.

Lacey v. Newcomb, 95 Iowa, 287, 63 N. W. 704 (1895). On landlord's lien for rent, see this case on page 52.

Kissick v. Bolton, 134 Iowa, 650, 112 N. W. 95 (1907). A coal lease, in which the consideration was a royalty on the coal mined, provided that operations should be begun within one year, but in case operations were not begun, then the lessee should pay "as advanced royalty" \$250 for the first year, \$300 for the second year, and that thereafter the lessee should guarantee that the royalty would be at least \$400 annually. No coal was mined until the third year, and that year the royalties amounted to \$302.72, and in the fourth year they amounted to \$227.91. The lessee paid the advanced royalty for the first two years, and in addition thereto \$77.07, making a total of \$627.07. It was held that the advanced royalties were to be applied on the royalties actually earned after the second year, and that the lessor was entitled to no further payments until enough coal had been mined to produce the amount of the advanced royalties, but that the royalties for each year after the second should equal at least \$400. The amount which had been paid by the lessee, namely, \$627.07, being equal to \$400 for the third year, plus \$227.91, the amount mined during the fourth year, the lessor could not recover further royalties in this suit.

Wilson v. Big Joe Block Coal Co., 142 Iowa, 521, 119 N. W. 604 (1909), affirming 134 Iowa, 594, 112 N. W. 89 (1907). A mining lease provided that the lessee should mine a minimum amount of coal and pay royalty on that amount, "but if second parties are prevented from taking out the said coal on account of any matters that they cannot avoid, then they shall not be required to take out any certain amount of coal or to pay for any amount not taken out." It was held that the lessee was not liable for royalty when the mine could not be operated, and the testimony of men of experience in mining as to whether the mine could be operated profitably was admissible in proof thereof.

Kansas.

Swan v. Brown, 8 Kan. App. 505, 56 Pac. 141 (1899). In an action to recover one year's rental under a coal mining lease, which contained an agreement by the lessees to operate the mine continuously, to pay as royalty a fixed price per bushel for all "lump" and "mine-run" coal taken from the mine, and that the annual output of the mine should be 500 cars of 500 bushels each of royalty coal, the defendants, who had mined only a small part of the amount so undertaken to be mined, offered no evidence in mitigation of damages, laid by the plaintiff at the total royalty which would have been due upon the minimum amount agreed to be mined. Held that the lease furnished the agreed minimum measure of plaintiff's right of recovery for one year's use and control of the mine by the defendant.

Mathes v. Shaw Oil Co., 80 Kan. 181, 101 Pac. 998 (1909). An oil and gas lease provided that if gas is found in any well or wells to justify the expense of saving and casing the same, the lessors should have on demand sufficient for domestic purposes, and the lessee should have the remainder. "If, however, second party shall use, market or sell gas from any well producing gas, it shall pay said first parties or assigns therefor \$50 per year for and during the time such gas shall be sold, marketed or used, except for drilling or domestic use of parties leasing to second parties," etc. Held the latter proviso indicates that gas shall be paid for if used by the lessee for any purpose other than for drilling, the purpose for which the gas is used by the lessee, rather than the amount produced by the well, being the test as to when rent shall be paid.

Rhodes v. Mound City Gas, Coal & Oil Co., 80 Kan. 762, 104 Pac. 851 (1909). An oil and gas lease dated June 18, 1902, contained a covenant by the lessee to drill a well within two years, "or thereafter pay to first party eighty dollars annually until said well is drilled, or this lease shall be void." It also contained provisions that if gas were found, the lessee should pay \$50 annually for every well from which gas was used, and that if no well was drilled within ten years, the lessee should reconvey and the lease should be null and void.

No well was drilled. The lease did not become void at the end of two years by reason of the lessee's failure to pay rental in advance. He had the whole of the third year to pay the annual sum of \$80, and a tender on April 24, 1905, was in time. "Diligence in sinking a well was not a vital feature of the contract. The lessee might drill a well at any time within two years, or he might suffer two years to lapse without doing anything, and then thereafter pay \$80 annually until he saw fit to drill a well, the latter alternative being limited by the ninth condition terminating the lease absolutely at the end of 10 years if no well should then be in existence. The annual payment of \$80 is the stipulated price of the privilege to delay drilling a well, and supposedly is an equivalent for the benefits the lessor would receive if a well were in operation." It is like a provision for the payment of an annual sum in any other kind of con-

tract, where the time of payment is not prescribed. It is performed by payment at the end of the year.

Kentucky.

Hardin v. Thompson, 22 Ky. Law Rep. 285, 57 S. W. 12 (1900). A coal lease provided that the lessee should pay to the lessor a royalty of five cents per ton on all lump coal mined, and five cents per ton on all "mine run" coal mined. The words "mine run" coal meant all of the coal that came out of the mine from the picks, embracing lump, nut and slack, and that lump coal was that which remained after the nut, slack and dirt had been separated from it by screening. The lessor was not entitled to a royalty on the screenings from the run of the mine coal which were extracted for the purpose of leaving the lump coal.

Drake v. Black Diamond Coal & Min. Co., 28 Ky. Law Rep. 533, 89 S. W. 545 (1905). A mining lease required lessees to use a bar screen of a certain mesh and pay a royalty on all coal not passing through. Without consent of the lessors, the screen was changed for one of larger mesh. Held that lessors were entitled to an injunction restraining further use of this screen; nor would lessees be heard to object because of the considerable amount of money expended by them in changing screens. In such an issue the court should admit evidence showing comparative results produced by such screens upon adjoining property.

Hatfield v. Followay, 113 S. W. 853 (1908). Several owners joined in a mining lease reserving royalty. Thereafter, in consideration of \$50, one of them disclaimed any interest in and to an advance of royalty of \$900 paid by lessee to lessors. The evidence showing that lessees had secured this disclaimer merely as a protection to themselves, held that such owner did not thereby disclaim all interest in future accruing royalties.

Michigan.

Iron Duke Mine v. Braastad, 112 Mich. 79, 70 N. W. 414 (1897). Lessor of a mine who by the lease reserved a lien for royalties on "all ore mined" may recover in trover against an assignee of the lessee, who not only fails to pay the royalties but sells the ore without preserving the lien. The reservation of such a lien is not waived by provisions in the lease which contemplated the shipping of the ore before payment of the royalties, which was to be paid every three months, and based on weights by the railroad company transporting the ore.

Montana.

Yank v. Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522 (1899). The lessees of a mine agreed with the lessor that they would operate the mine, the lessor providing all supplies and materials necessary to carry on the work; and the net proceeds of the ore, after milling or reduction,

were to be divided equally between the lessor and the lessees. The term "net proceeds" meant the avails of the ore, less charges of milling and reduction only. Instructions of the court below "that the term meant net value of the ore after deducting all proper charges for mining, hoisting, handling and smelting and reducing it, were misleading, confusing and erroneous."

New York.

Chase v. Knickerbocker Phosphate Co., 32 App. Div. 400, 53 N. Y. Supp. 220 (1898). A lease provided that the lessor should be paid, as royalty, the sum of fifty cents per ton of phosphate mined, payment to be made every two months; also that there should be a monthly payment of \$125 to be credited on the royalty. Held, that each period of two months should be taken by itself; that any excess of royalties above the monthly payments for such two months should be paid to the lessor; but, if the royalties for that period were less than the monthly payments, the amount of the monthly payments should be considered the rent for that time, and the excess of the monthly payments above the royalties should not be carried forward, to be credited on royalties for subsequent mining.

Genet v. Delaware & Hudson Canal Co., 163 N. Y. 173, 57 N. E. 297 (1900), followed in 71 App. Div. 613, 75 N. Y. Supp. 553 (1902). A coal lease provided that the lessee should "pay for the coal mined and taken out in pursuance of this agreement at the rate of 12-½ cents for every ton of clean, merchantable coal, exclusive of culm or mine waste, that will pass through a mesh one one-half inch square." The lessee was required to mine not less than 10,000 tons a year, and to pay for 10,000 tons whether the same were mined or not. Held that the lessee was not required, under this lease, to mine culm or any other coal of inferior quality than "merchantable" coal, but if the lessee chose to do so and to take such coal, the lessee was bound to pay royalty on it the same as upon other coal.

Genet v. Delaware & Hudson Canal Co., 186 N. Y. 422, 79 N. E. 437 (1906), follows the last case and decides that the exportation of coal of inferior size or quality to the lands of the lessee and there mingling it with coal from other mines, thus exercising exclusive control and dominion over the same, and removing it beyond the power of the lessor to assert ownership, was such a taking of the coal as to entitle the lessor to royalty thereon.

Roberts v. Roberts, 134 App. Div. 816, 119 N. Y. Supp. 466 (1909). A lease of land dated September 11, 1907, for ten years, for the purpose of mining and operating for mica, contained a covenant by the lessee to pay to the lessor, for each and every ton of mica taken from the premises, 10 per cent of the market value thereof at the dump. There was a further covenant as to the minimum price to be paid each year, and following this a covenant by the lessee "to make such first payment on the 11th day of December, and the payments hereunder at the expiration of each and every month." The minimum payment for the first year was not due on

December 11, 1907, but at the end of the year. That date fixed the time when the payments on the 10 per cent basis should begin.

Ohio.

Meeker v. Browning, 9 Ohio Cir. Dec. 108 (1894). An oil and gas lease provided that the lessees were to give to the lessors one-sixth of all the oil or mineral produced and saved from the leased premises. The lessors brought an action to recover damages for the conversion of oil used by the lessees for fuel purposes in their operations under the lease. Held that they could recover only one-sixth of the gross amount so used.

Woodland Oil Co. v. Crawford, 55 Ohio, 161, 44 N. E. 1093, 34 L. R. A. 62 (1896). See this case on page 69.

Detlor v. Holland, 57 Ohio, 492, 49 N. E. 690, 40 L. R. A. 266 (1898). See this case on page 194.

Wonsetler v. Andrews, 58 Ohio, 551, 51 N. E. 168 (1898). In an action to recover the sum agreed to be paid for the right to enter upon the plaintiff's land to explore for coal, and to mine and remove the same, at an agreed price per ton, money paid by the defendant as annual rent for coal prior to the commencement of mining operations, and intended by the parties as compensation for the postponement of such operations, will not be credited upon the agreed price of the coal, when removed, though the language of the instrument upon which the action is founded be appropriate to pass a present title to the coal.

Ohio Oil Co. v. Lane, 59 Ohio, 307, 52 N. E. 791 (1898). A grant of all the oil and gas in and under a tract of land upon the stipulation that, if gas only is found, the grantee will pay a fixed sum per year for each well "while the same is being used off the premises," and containing no stipulation inconsistent therewith, should not be so construed as to require it to pay such sum for a gas well whose product is not used, even though the jury should be of the opinion that it might have been used off the premises without financial loss to the company.

Busbey v. Russell, 18 Ohio Cir. Ct. R. 12, 10 O. C. D. 23 (1898). An oil and gas lease provided that the lessees were to deliver to the lessor one-eighth part of all the oil produced and saved, and that if wells were found producing gas in sufficient quantity to justify marketing, the lessor "should be paid at the rate of one-eighth of income dollars per year for such well so long as the gas therefrom should be sold." Held that the word "income" meant gross income and not net income.

Allison v. Luhrig Coal Co., 22 Ohio Cir. Ct. 489, 12 O. C. D. 504 (1901). The lessor of a mine is entitled in equity to an accounting by the lessee for the amount of royalties due under the lease.

Van Etten v. Kelly, 66 Ohio, 605, 64 N. E. 560 (1902). An oil lease which required certain wells to be completed within stated times contained the following: "In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month in advance while such completion is delayed." Held that this did not constitute a promise

or obligation to pay rental; and that the lessee had the option to complete wells or pay rental to keep the lease alive, and that upon breach of the agreement to complete wells no action would lie for the recovery of rentals.

Pennsylvania.

Wood's Appeal, 30 Pa. 274 (1858). When a lease of a mine contains a right of re-entry, arrears of rent are a lien, and as such are first payable out of the proceeds of a sheriff's sale of the leasehold. This lien is prior to that of miners and laborers under the statute.

Miners' Bank v. Heilner, 47 Pa. 452 (1864). A coal lease provided for forfeiture for certain causes and the right of the lessor thereupon to retake possession. Rent due under this lease was not a prior lien under the act of April 6, 1830, relating to mortgages, so that a mortgage of the leasehold would be discharged by a sheriff's sale thereof.

Three judges held that such rent was a lien, and being analogous to ground rents, the lien of the mortgage was preserved by the provision of the act as to other mortgages, ground rents, etc.

A stipulation in a lease for the repayment of an improvement fund by "an additional rent of ten cents per ton, etc.," is a provision for the payment of a loan and is not rent.

Schooley v. Butler Mine Co., 175 Pa. 261, 34 Atl. 639 (1896). By the terms of a lease of coal lands, lessee agreed to mine annually at least 40,000 tons after a given date and to pay royalties in equal monthly instalments upon that amount, whether mined and taken away or not. The lease provided that royalties on prepared coal should be 25 cents on all sizes larger than pea coal and that on pea coal and smaller sizes they should be graduated according to prices received for them at the mine, and that, where coal was shipped without being prepared, a royalty of 25 cents per ton should be paid. It was not provided at what rate or in what proportion the royalty on the minimum was to be paid in the event of its not being mined. It was held that this was to be based upon the different sizes of coal produced in the proportion that they were produced by the ordinary and careful mining of the coal. Payment was offered by the lessee based upon the proportion of these sizes in the production of the month for which the royalty was paid where that production was less than one-twelfth of 40,000 tons, and, when no coal at all was produced, then upon the production of the last month when coal was produced, and this basis was approved by the court.

Maffet Estate, 9 Kulp. 136 (1897). See this case on page. 8.

Wright v. Warrior Run Coal Co., 182 Pa. 514, 38 Atl. 491 (1897). A coal lease made in 1864 for 10 years, with the privilege in the lessee of extending it 99 years, provided for a royalty of 15 cents per ton, "chestnut coal to be half price." At that time there were seven sizes of coal, of which chestnut was the smallest. Coal of smaller sizes than this was treated as waste. Subsequently, these smaller sizes became marketable, the demand for the largest sizes ceased and the demand for the intermediate

sizes increased. The breaking of coal was carried to a greater extent to meet this demand. As a consequence, the production of chestnut coal, which at first had been about fifteen per cent of the whole, increased as did also that of pea and buckwheat. On a bill for an account of royalties by the heir of the lessor, the lessee was charged full royalty on the chestnut, pea and buckwheat produce in excess of fifteen per cent. Mitchell, J., dissenting.

Royalty was held not to be collectable on coal used under lessee's boilers.

Douthett v. Gibson, 11 Pa. Super. Ct. 543 (1899). See this case on page 237.

Iams v. Carnegie Nat. Gas Co., 194 Pa. 72, 45 Atl. 54 (1899). A lease of lands for oil and gas purposes for two years "or for such time as oil and gas should be found in paying quantities" provided for a royalty on the oil produced, "and should gas be found in sufficient quantities to justify marketing the same," lessee was to pay \$500 per annum "for the gas from each well so long as it shall be sold therefrom." In an action for rental for gas, the court instructed the jury that they should find whether gas had been obtained in paying quantities sufficient to justify the defendant in marketing it; that he would not be required to market it at a loss, but only at a reasonable profit; and in determining whether it could be so marketed, the distance to market, expense of marketing and every thing of that kind should be taken into consideration; and that if they should find that gas had been obtained in paying quantities, defendant was bound to market it or show some good reason for not having done so. The court refused to charge that the fact that gas had not been sold or marketed defeated plaintiff's right of recovery. This was held not to be error.

Jack v. Forsyth, 194 Pa. 227, 45 Atl. 50 (1899). A coal lease provided for payment of royalty on every bushel of coal mined "as made up and taken from the pay roll of said works." Royalty was due on "entry coal," i. e., coal taken out in construction of entries, although the lessee did not note on the pay rolls the number of bushels of entry coal mined, but only the number of yards.

Hosack v. Crill, 18 Pa. Super. Ct. 90 (1901). See this case on page 42.

Johnston v. Filer, 201 Pa. 60, 50 Atl. 940 (1902). Lessee agreed to pay "ten cents for each ton of 2,240 pounds of merchantable screened block coal, and ten cents for each ton of merchantable screened bituminous coal, the screen used not to exceed one and one-half inches, and the screenings to belong to the party of the second part, free of charge, and ten cents for each ton of 2,240 pounds of limestone." Held (1) that a ton of 2,240 pounds of "merchantable screened bituminous coal" was contemplated by the contract, the presumption being that as a ton of that kind was specified at the first mention of the coal, it was intended to apply to all kinds of coal that were mentioned; (2) that whatever passed through a screen of one and one-half inches belonged to the mining company, and it was immaterial that the company passed it a second time over a smaller mesh, and thus obtained a nut coal which they could sell on the market.

Denniston v. Haddock, 200 Pa. 426, 50 Atl. 197 (1901). See this case on page 42.

Coulter v. Conemaugh Gas Co., 14 Pa. Super. Ct. 553 (1900). A lease of land for the purpose of operating for oil or gas provided that, if gas only should be found, the lessee should pay "\$300 each year quarterly for the product of each well while the same is being used off the premises." "We are of opinion that the stipulation was for a year. When a new year was entered upon an obligation to pay for all of that year arose, subject to the right to annul by reassignment. If the product of the well ceased to be used off the premises during that year, it was a risk assumed by the lessee. The year knew no fractions. In respect to the liability to pay there was no apportionment provided in the case of failure of gas."

Lehigh Valley Coal Co. v. Everhart, 203 Pa. 118, 55 Atl. 864 (1903). A lease demised all the anthracite coal under a tract of land, together with certain surface and timber rights, "until all the merchantable coal which can be mined and removed by proper, skillful and workmanlike mining shall be mined out and exhausted." The lessee agreed to pay a royalty of thirty cents for each ton of coal mined and shipped, and that after the first year he would pay "a fixed minimum cash royalty annually of thirty thousand dollars in quarterly instalments as aforesaid and for such payment may mine and remove in each and every year as aforesaid one hundred thousand tons of coal of the sizes larger than pea coal. * * * And if in any one year the stipulated minimum cash royalty shall be paid and sufficient coal at the royalty aforesaid to equal such minimum shall not have been mined out and removed, the deficit may be mined out and removed, without charge, in any subsequent year of the term." Provision was made for forfeiture for nonpayment of rent.

The lessee, upon the ground that the minimum royalties paid being sufficient to pay not only for all coal mined but for all that remained in the ground, they therefore constituted a payment of the full amount of royalty for all the coal, sought to enjoin the lessor from enforcing a forfeiture, and to obtain a decree that it was entitled to possession without further payment until it should have mined and removed the remainder of the coal in and under the premises. The bill was dismissed. (*Lehigh & Wilkes-Barre Coal Co. v. Wright*, vol. 1, p. 122, followed.)

Dorr v. Reynolds, 26 Pa. Super. Ct. 139 (1904). See this case on page 43.

Stone v. Marshall Oil Co., 208 Pa. 85, 57 Atl. 183, 85 Am. St. Rep. 904, 65 L. R. A. 218 (1904). A lessee for oil and gas purposes, who by the terms of the lease was bound to render to the lessor one-fourth of the product, failed to keep account of the gas produced from the land and fraudulently mingled it with gas from other wells so that its amount could not be ascertained. On a bill for an account it was held that the lessee was bound to account for one-fourth of the profits on all of the commingled gas. "Although such a term as 'confusion of goods' is generally used, there is, in fact, no such doctrine as a 'confusion of goods;' there is a fact of confusion of goods, which, if committed with a fraudulent motive, subjects the transaction to an inflexible rule, rigorously enforced both at law and in equity, that the wrongdoer shall not profit by, nor the innocent party suffer from the wrong."

McArthur v. Tionesta Gas Co., 28 Pa. Super. Ct. 568 (1905). An oil and gas lease provided as follows: "The party of the first part is to receive the one-eighth ($\frac{1}{8}$) part of all the oil, gas or other minerals obtained therefrom, to be delivered to the party of the first part in the pipe line upon the premises." This was all printed except the words "one-eighth" and the fraction " $\frac{1}{8}$ " and the words "in the pipe line," which were written. Further along in the lease was the following, all in writing: "Should gas be found in well or wells sunk on said demised premises, and should gas be taken off said premises and sold for compensation by said lessees, the said lessee shall pay to the said lessor \$50.00 per annum for a gas pressure of 125 pounds to the square inch, and for each 125 pounds additional pressure an additional sum of \$50.00 per annum." There was a pipe line company for the transportation of oil which received oil on the premises, but none which received gas. No oil was found, but gas was produced and the lessee made payment therefor under the last clause for eight years. Held that the above provisions were conflicting, and the last furnished the rule for compensating the lessor for all gas produced.

Myers v. Consumers' Coal Co., 212 Pa. 193, 61 Atl. 825 (1905). Where, on a bill in equity for an account of royalties under a coal lease, it appears that by a change in the machinery and methods of preparing coal, used at the time of the lease and for some years thereafter, the amount of larger royalty coal was greatly diminished and the amount of waste and smaller sizes of coal, paying a lower rental, was largely increased, it is imperative upon the court below to find as a fact the proportion of the mine product which was royalty coal under the former as well as the later methods of preparing coal. In view of the testimony in this case, and of the decision in *Wright v. Warrior Run Coal Co.*, a finding that at the date of the lease the quantity of chestnut coal marketed in the region bore no fixed or recognised proportion to that of other sizes, and that there was no customary standard of proportion governing the production of the various sizes, will not be sustained.

Hoyt v. Kingston Coal Co., 212 Pa. 205, 61 Atl. 885 (1905). By the terms of the lease the coal was demised for the consideration of a rental of 15 cents for each ton which would pass over a screen, the meshes of which were five-eighths of an inch square. The trial judge found that, at the time of the execution of the lease by the methods and machinery employed in mining and preparing coal and known to the parties, a less proportion of the mine product passed through the meshes of the screen than passed through it from the time the defendant company began mining operations in 1883 till the filing of the bill; and "that the said excess of the proportion of the product of the mine passing through the said five-eighths of one inch square mesh has been occasioned by the change of the methods in the preparation of coal in the use of higher explosives in blasting it from the vein deposited in the mine, by the introduction of a greater number of rolls in the breaker than were used at the time of the execution of the lease as an effort on the part of the defendant to increase out of the product of the mine, the amount of smaller sizes to meet the changed

demands of the market." He further found that by the methods employed in preparing coal at the execution of the lease .10655 per cent of the mine product passed through the meshes of the screen and that, by the subsequent and present methods used in the preparation of the coal, .26522 per cent of the product passed through this screen. Against this difference of .15867 per cent of the loss caused to the plaintiffs by the different methods of preparation of the coal, the court credited the defendant with the bad coal reclaimed, amounting to .0359 per cent, "leaving a net loss to the plaintiffs since the introduction of the new methods over the old methods of .12277." The court ordered the defendant company to account to the plaintiffs for this amount of coal at the royalty price named in the lease.

"The court followed and enforced the rule announced in the Wright case, that while the defendant company had the right under the contract to adopt new methods in the preparation of coal so as to meet the market demands for the smaller sizes of coal, yet it must account and pay for the same proportionate part of the coal as the terms of the lease required under the methods of preparation in use at the time the lease was executed."

"The methods of preparation used by and known to anthracite operators at the time the lease was executed must be presumed to have been in the contemplation of the parties when they executed the contract and such coal as was produced by those methods furnished the basis of the lessor's consideration for the lease, and must now and during the continuance of the lease determine the quantity of coal on which royalty must be paid. If the lessees should leave coal in the mine which was marketable and would pass over the screen, it would be waste and a consequent violation of their contract. That it was at one time not marketable and was for that reason permitted to remain in the mine will not excuse the lessees or their assignees in not conveying it to the breaker now, or, if passed over the screen, entitle them to a credit against the plaintiffs' demand. It would likewise be a violation of their contractual obligation were the lessees to fail to mine any seam of coal included in the lease which could be mined and removed by the customary methods of mining during the existence of the lease. They are not compelled to mine all of the veins at the same time. They are simply required to mine and remove the annual minimum quantity of coal, ascertained by passing it over the requisite sized screen, or pay the minimum royalty thereon during the term for which the lease was to run, as provided in that instrument. The fact, therefore, that certain seams were not being operated at the time of the execution of the lease does not entitle the defendant company to a credit for coal now being taken from those seams by the mining methods in use at this time."

Coolbaugh v. Lehigh & Wilkes-Barre Coal Co., 213 Pa. 28, 62 Atl. 94 (1905). See this case on page 45.

Pennsylvania Coal & Coke Co. v. Witherow, 215 Pa. 327, 64 Atl. 535 (1906). A coal lease provided for the payment of ten cents per ton

royalty on all merchantable coal mined or that could reasonably be mined; that the lessee should begin the shipment of coal within four months "or pay a minimum royalty on thirty thousand tons per year in lieu thereof; and to pay continuously a minimum royalty at the rate of thirty thousand tons per year until said coal was exhausted." It was further provided "if the minimum amount was not mined, but paid for, that the excess of all sums over and above the coal actually mined shall be applied on the coal to be mined in succeeding months so that in the end no more coal shall be paid for than is actually mined and taken out under this lease." A supplemental agreement was afterwards made which provided for the payment of fixed amounts of royalties each month, making the total annual payment \$2,000, and that if the lessee " * * * in any year fail to mine the full minimum of thirty thousand tons called for in the lease, he or his assigns shall pay to the lessor a bonus of sixty dollars for each year he fails to mine the full minimum in addition to the sum hereinbefore specified in this supplement, the sixty dollars not to be deducted from any royalty otherwise due * * * the original lease to be and remain unchanged in all other respects." Held (1) that the supplemental agreement was an absolute contract by the lessee to pay the lessor the fixed sum named therein at fixed times regardless of all other conditions; (2) that in the absence of proof that the plaintiff had paid royalty for all coal that could be mined, the provision of the original lease "that in the end no more coal should be paid for than is actually mined" did not become operative; and (3) that overpayment for the coal actually mined did not relieve the lessee from the payment of minimum royalty as long as the lessee remained in possession.

Jackson v. American Nat. Gas Co., 31 Pa. Super. Ct. 408 (1906). Plaintiff leased to defendant's assignor the oil and gas under a tract of 275 acres for one-eighth of the oil produced and a fixed rental for each gas well. After providing that, if no well was commenced within three months, the grant should become void, but that such forfeiture might be prevented from quarter to quarter by payments at the rate of \$68.75 per quarter, it was further provided: "When a well is completed, the rental is thereby reduced to \$183.33 per year, or \$45.83 per quarter, and the well holds protection of ninety-one acres. When second well is completed, the rental is reduced to \$91.66 per year, or \$22.91 per quarter; and when a third well is completed the rental ceases, and it is understood each well holds for protection one-third of the 275 acres." Two wells were completed and it was held that the plaintiff could recover the rental of \$22.91 per quarter. "The agreement furnished no means of determining what part of the tract should be protected by the first and second wells drilled. The farm was dealt with as an entirety, and the effect of this clause of the lease was to vest in the lessee an actual interest in the land, during the term of ten years. As soon as the first well was completed, that well protected the interest of the lessee in one undivided third of the 275 acres; when a second well was completed, his interest was protected as to two undivided thirds of 275 acres; and, had he completed a third well, his

interest in the oil and gas under the entire 275 acres would have been absolutely protected to the end of the ten-year term. The amount to be paid after the completion of the first and second wells is by the parties called a rental, whereas they had not so designated the moneys which were to be paid by the lessee in order to avoid a forfeiture before operations were commenced, thus clearly indicating that they understood the meaning of the term rental and here used it in the sense of money paid for the use of land under a covenant."

Troxell v. Anderson Coal Min. Co., 213 Pa. 475, 62 Atl. 1083 (1906). A lease of land for coal mining purposes provided that royalty should be paid on a minimum amount whether mined or not, "unless prevented by faults in the strata unforeseen." Lessee made no effort to mine the coal on the leased premises, but sought to reach it through a mine operated on adjoining land. In so doing it encountered faults which prevented it from reaching and mining the coal. This did not excuse the lessee from the payment of royalties. The lease contemplated an effort on the leased premises to reach the coal and the faults intended were such as might be there encountered.

Gallagher v. Hicks, 216 Pa. 243, 65 Atl. 623 (1907). See this case on page 46.

In re Murray's Estate, 216 Pa. 270, 65 Atl. 675 (1907). Where a decedent has sold the coal underlying a tract of land on royalty, his widow is entitled to her share of the royalties as personal property, and the executor has no right to deprive her of them by declaring a forfeiture of the lease.

Everhart v. Lehigh Valley Coal Co., 218 Pa. 307, 67 Atl. 618 (1907). Where coal mined under a lease is prepared for market by breakers situated on adjoining properties, and one of such breakers is destroyed by fire, but the mining of the coal is not interrupted inasmuch as it is prepared in the remaining breakers, the lessee is not entitled to take advantage of a provision in the lease that royalties shall not be demanded during the time that the production or shipping of coal is actually prevented by the destruction of a breaker.

Turner v. Lehigh Valley Coal Co., 34 Pa. Super. Ct. 101 (1907). See this case on page 47.

McKeever v. Westmoreland Coal Co., 219 Pa. 234, 68 Atl. 670 (1908). Where the provisions of a coal lease, relating to royalties, are obscure, and are susceptible of two different meanings, and the lessor for a long period of years has accepted payment of royalties on a basis determined by one construction of the lease, he will not be permitted to set up another construction of the lease, and claim royalties, based upon such construction.

Glick v. Lehigh Valley Coal Co., 221 Pa. 428, 70 Atl. 810 (1908). A coal lease provided for the payment of royalty on coal mined and removed, "excepting, however, that coal which is known to the trade as pea coal, the rental for which shall be at half price. Pea coal is hereby defined to be that coal which passes with the dirt through a screen of three-quarters of an inch mesh." The lessee having admitted that he mined and sold

coal known as buckwheat, rice and barley coal, all of which passed through such a screen, cannot allege as a ground for not paying royalties thereon that the sizes specified were not known as pea coal at the time the lease was made, or at the present time, or were not pea coal as defined by the lease.

Woodruff v. Gunton, 222 Pa. 376, 71 Atl. 849 (1909). In a coal lease upon royalty it was provided that "these prices are for all coal that will pass over a screen of an eighth of an inch mesh and all that will pass through is to be classified as culm, and for said culm that is sold the said lessee is to pay the lessors one-tenth of the net profit of said culm." In an action to recover for this profit the lessee contended that the entire cost of mining the coal and culm was to be taken into account in determining what were the net profits on the culm. The lessor introduced evidence which tended to show that it was impossible for the lessee to mine and prepare the royalty coal for market without producing culm, and that when the culm was sold by the defendant, the entire amount received for the same, less the cost of loading it, was net profit, as it had cost the lessee nothing to produce it. Held that the case was for the jury, and that a verdict and judgment for plaintiff should be sustained.

Woodruff v. Gunton, 222 Pa. 384, 71 Atl. 851 (1909). A coal lease provided: "The lessee will pay to said lessors in monthly instalments for so much coal as they may mine during the year 1898 at the rates hereinafter named: \$3,000.00 for the balance of 1898; \$6,000.00 for the year 1899; \$6,000.00 for each and every year thereafter until all the coal is exhausted, or this lease is determined, in monthly instalments payable on the 15th day of each month for the proportion of mine rent due for the preceding month. And in consideration of the payment of said mine rent the said lessee shall be entitled to mine and move each year from the demised premises so many tons of coal of 2,240 lbs. each as multiplied by twenty-five cents per ton will be the equivalent of mine rent for such year; and for all coal mined in any year in excess hereof the said lessee shall pay at the rate of twenty-five cents per ton of 2,240 lbs. each in monthly instalments as aforesaid." The lessee did not mine the minimum quantity in 1898 and 1899, but did mine and pay for enough coal in subsequent years to make up the deficiency. It was held that the lessor could recover the balance of the minimum royalties for the two first years.

"Whether the privilege to mine a certain amount of coal, in consideration of the payment of an annual royalty or rent, is exercised or not, the covenant of the lessee is to pay a fixed sum for the privilege. If the amount of coal which the lessee is permitted to mine in each year is not mined, there is no stipulation for a proportionate abatement of the annual royalty, nor is a privilege given to him to recoup himself after having paid such royalty by mining the deficiency in a subsequent year without paying therefor. Such was the privilege in the leases under consideration in *Lehigh & Wilkes-Barre Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919; *Lehigh Valley Coal Co. v. Everhart*, 208 Pa. 118, 55 Atl. 864; *Pennsylvania Coal & Coke Co. v. Witherow*, 215 Pa. 327, 64 Atl. 535; but the

express covenant of the present lessee is that for each year and in each year he will pay a fixed sum, and in addition thereto twenty-five cents for every ton of coal mined in excess of what he is permitted to mine in consideration of the payment of the fixed sum. The payment of the royalty or rental for each year is independent of the payment in any other year, and the mining of the coal each year is independent of the mining in any other year."

New York & Pittston Coal Co. v. Hillside Coal & Iron Co., 225 Pa. 211, 74 Atl. 26 (1909). A lease of the merchantable anthracite coal in described premises provided that the royalty for all coal above the size of pea should be twenty-five cents, and for all pea coal twelve and one-half cents per ton, pea coal being designated as such as would pass over a mesh in the screen of seven-sixteenths of an inch square and through one of three-quarters of an inch square. That smaller sizes than pea would result from the mining was clearly contemplated by the parties, for it was agreed that the proportion of pea coal and the smaller sizes should not be greater than that prepared at other collieries in the Wyoming Valley in operation at the same time. It was held that the lessor reserved no coal of any size to itself, and that the lessee may mine and remove all the merchantable coal from the premises, and that there was no liability to pay royalties to the lessor on sizes smaller than pea, known as buckwheat, rice and barley.

Tennessee.

Nunnelly v. Warner Iron Co., 94 Tenn. 282, 29 S. W. 124 (1895). A mining lease provided that the lessee should give to the lessor "one-tenth part of all the iron ore, or other products or minerals obtained from said land, delivered at the mine or shaft in shipping order and accessible to wagons or pay for the same the cost price of mining or delivery as above stated." The mining was for some time carried on by digging out the ore from horizontal cuts in the hill side, hauling it away on wagons and the cleaning it by hand and by means of riddles or screens. Subsequently, improved machinery was adopted for mining and washing the ore, whereby the ore was obtained in a cleaner condition and there was less loss. The lessor must accept riddled ore or the cost of mining and delivery of riddled ore, and was not entitled to ore prepared by the improved process, or to the cost of mining and delivering it.

Smith v. Godfrey, 48 S. W. 303 (1898). A lease provided that the lessees were to pay to the lessors the sum of fifty cents per cubic yard for all marble quarried by the lessees; the lessees were to quarry enough marble to bring the royalty up to the sum of \$200 per annum, or else make up the deficit in cash; but all such payments were to be in the nature of advanced royalty, and were to be deducted from other royalty as it became due whenever the excess of the marble quarried over and above \$200 should entitle the lessees to the same. Held that the lessees might, in any year when enough marble was quarried to pay the minimum royalty for

that year and also a surplus, reimburse themselves out of that surplus for such sum as in previous years they may have been obliged to pay in order to bring any of such years up to the minimum royalty; but that the lessees were not entitled to credit themselves out of previous royalties for any subsequent deficits below the minimum royalty, as the lease did not contemplate merely an "average" payment of \$200 running over all the years during which the lease was to continue. Therefore, the fact that the lessees paid more than the minimum in any one year would not entitle them to pay less than the minimum in any succeeding year.

Coal Creek Min. & Mfg. Co. v. Tennessee Coal Iron & R. Co., 103 Tenn. 651, 62 S. W. 162 (1901). A coal lease provided that the lessees should pay to the lessors a certain royalty on all coal mined. They also covenanted that they would mine and take from the premises not less than 25,000 tons during each of the years 1889 and 1890, and not less than 50,000 tons each year thereafter during the continuance of the lease; if they failed to mine the 25,000 tons for the years stipulated, they agreed to pay, "as liquidated rent" for the demised premises, such amount as, added to the royalty paid on the coal actually mined, would be equal to the sum of \$4,000; and if they failed to mine the 50,000 tons for the years stipulated, they agreed to pay, "as liquidated rent" for the demised premises, such amount as, added to the royalty paid on the coal actually mined, would be equal to the sum of \$8,000. Held that the general rule, that when damages are in their nature indefinite and uncertain, and the parties have mentioned a specific sum of liquidated damages, it will be so regarded, unless it be greatly disproportioned to any probable estimate of damages, is especially applicable to a mining contract. "The value of the lessor's coal imbedded in the earth as an income-producing property depends upon the amount of it which is excavated by the labor of the lessees. If much is thus produced, the results for the lessors will be favorable; if little, then they will be correspondingly less. It is impossible for the lessor antecedently to determine how well the lessee will discharge his obligation, whether he will be slothful or diligent; and thus he is unable to calculate either accurately or with approximation, what his money loss will be if the lessee is negligent in performing or wholly disregards his contract. Such a contract, it would appear, would be an eminently proper one for a stipulation providing liquidated rent or royalty for a breach."

The question of reasonableness or unreasonableness must be determined from the situation of the parties at the time the contract was made, and the nature of the business itself. Here the mine had been worked for a considerable time before the execution of the lease in question; the lessees, before taking the lease, sent an expert to examine the mine and therefore knew its capabilities. Several mines worked by the lessees produced a greater output than the minimum amount contracted for in this lease. Under these circumstances the minimum rental or royalty provided for will be held to be liquidated damages, and not a penalty. The fact that the lessors made out accounts of royalties due, based merely on the amount of coal actually mined, without saying anything about the coal not mined,

is immaterial, because the lease conferred in this respect a fixed legal right on the lessors and imposed a corresponding legal obligation upon the lessees, and consequently the lessors were not bound to demand payment at any specified time.

Harlan v. Central Phosphate Co., 62 S. W. 614 (1901). A mining lease provided that the lessee should pay to the lessor a royalty of a certain amount per ton for phosphate mined on the premises "when mined and weighed". The royalty was to be increased per ton as the market price rose, according to a specified scale. Held that, inasmuch as no rock is sold by the lessee in the condition in which it is found just after the mining and drying, and at the time the first weighing takes place (although some mines do sell the phosphate rock), and as the lessee, by its processes, divides the rock into two grades and sells it in that form, the only fair way of reaching the market price, within the spirit of the lease, is to take the price of export rock, and also the price of domestic rock, and compel a settlement on that basis; and it would be unfair to the lessor to force him to settle on the basis of the market price of the inferior product left after taking from the mass the superior product known as "export rock". It is immaterial that at the time the lease was executed no such form of preparation of the product for market was practiced, but the product was sold merely after drying and breaking up.

If the lessee, before putting upon the market the residuum which it sells as domestic phosphate, grinds that residuum and puts it in bags, at a certain cost, the lessee, in fixing the market price so as to compute the royalties due under the lease, is not entitled to credit for this additional expense of preparation. The lessor cannot be charged with the cost of preparing the product for market, or any part of it.

Virginia.

Big Stone Gap Iron Co. v. Olinger, 104 Va. 261, 51 S. E. 355 (1905). It was provided in the lease that lessor should mine a fixed amount of ore per month and pay royalty thereon, provided there was so much merchantable iron ore upon the land capable of being mined at a reasonable cost. The burden was on the lessee to prove the absence of ore in the quantities and qualities provided for in order to determine whether the ore could be mined at a reasonable cost. It is not sufficient to show the cost at other mines without showing the conditions also at those mines.

West Virginia.

Coaldale Min. & Mfg. Co. v. Clark, 43 W. Va. 84, 27 S. E. 294 (1897). A mining lease provided for the payment to the lessors of a royalty or rental of ten cents for each and every ton of coal passing over a certain screen described in the lease, and five cents per ton for every ton which passed through the screen, and which should be shipped from the demised premises, and that the lessees should pay to the lessors the sum of \$3.000

annually as a minimum rental, whether the quantity of coal produced that amount of rental or not. The lessees became insolvent, the works were shut down, and a receiver appointed. No rent or royalty had been paid for five months. Held that the lessors were entitled to a lien upon the property for rent due and unpaid to the amount, not of \$500, being the royalty on the actual amount of coal mined during the five months, but of \$1,250, being five-twelfths of the minimum of \$3,000 annual rental under the lease.

Snodgrass v. South Penn Oil Co., 47 W. Va. 509, 35 S. E. 820 (1900). Where a party leases a tract of land for the purpose of mining and operating for oil and gas, the lessee contracting to deliver to the credit of the lessee one-eighth of the oil produced and saved from the premises, and to pay \$200 per year for the gas from each well drilled, and the lease also contains the following provision: "Provided, however, that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof, or unless the lessee shall pay at the rate of \$350 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well, until a well is completed." Held that this provision did not bind the lessee to pay any rent for the land, or for delay in commencing to operate for oil and gas, and, in the absence of some other clause binding the lessee to pay such rent or for delay, an action of assumpsit could not be maintained on such lease for failure to pay such rent or for such delay.

Sicearingen v. Steers, 49 W. Va. 312, 38 S. E. 510 (1901). If the rent or royalty reserved in the leasing of mineral property is dependent upon the amount of mineral taken, a bill in equity will lie to compel an accounting by the operators or lessees of the mines.

Lawson v. Kirchner, 50 W. Va. 334, 40 S. E. 344 (1901). A person who accepts an oil or gas lease, with a stipulation therein contained to pay a monthly rental until a well is completed, or until the expiration of a certain fixed term, is bound to pay such rental, although he does not, within such term, enter upon the land and complete such well, unless he was prevented from doing so by the plaintiffs, and not by mere personal default.

Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 S. E. 258 (1907). A lease of coal and coke lands provided that the lessee should pay a minimum royalty "whether the quantity of coal mined or coke manufactured shall produce that amount of royalty or not," and that in case the lessee failed to comply with the provisions of the lease as to the payment of royalties or as to the development of the property, the lease should be forfeited. It was held that there was an absolute undertaking to pay rent, that the forfeiture was at the option of the lessor, and the lessee could not avoid his obligation by the mere failure to enter upon the land and occupy or develop it.

Robinson v. Kistler, 62 W. Va. 489, 59 S. E. 505 (1907). A mining lease on royalty provided a fixed minimum below which the royalty was

not to fail except "in case of strikes, accidents or any cause of stoppage of transportation over which" lessee "has no control, and he is disabled and prohibited thereby from mining or shipping coal from the said mine." A failure in car supply was a "cause of stoppage of transportation," and during the stoppage the lessee was liable only for the royalty on the coal actually mined and shipped. * The words "over which lessee has no control" are the same as "for which lessee is not to blame," or "without lessee's fault," relating only to the personal and immediate control of the lessee, and, in order to take advantage of it, he was not bound to sue the railroad companies or take any other uncertain proceedings.

Moore v. Ohio Valley Gas Co., 63 W. Va. 455, 60 S. E. 401 (1908). An oil and gas lease provided that "if gas only is found and the same is marketed off the premises," lessee "agrees to pay \$5 per pound per annum payable semi-annually in advance for each pound registered in one minute on casing at well six months from date of completion." No test of the pressure was made at the time appointed, but, based on the pressure ascertained when the well was completed, lessee paid the first semi-annual instalment shortly after taking such pressure. In a suit for the next instalment, held that it would be presumed, until the contrary is shown, that the pressure in the well continued as shown at its completion.

Smith v. South Penn Oil Co., 59 W. Va. 204, 53 S. E. 152 (1906). See this case on page 227.

III. THE PREMISES.

A. *Rights Growing out of the Description or Nature of these or Incident thereto.*

p. 123.

United States.

Delaware, L. & W. R. Co. v. Gleason, 86 C. C. A. 383, 159 Fed. 383 (1908). 3rd Circ., reversing *Hoysradt v. Delaware, L. & W. R. Co.*, 151 Fed. 321 (1907). C. C. M. D. Pa. A deed made in 1823 conveyed "All that certain coal bed on the Lackawanna Creek, on lot No. 1 * * * now occupied by the said Wilson, together with a road and cartway to and from said coal bed to the public road, etc." This was held to pass the entire vein underlying the lot, and not only the part which had been opened and worked by Wilson. The plain meaning of "coal bed" "is, and always has been, a bed of coal, just as the meaning of 'coal vein' is a vein of coal, and never could have been anything else. A 'bed' has been well defined as being synonymous with 'vein'. It is not a section or piece of one." The words were not ambiguous; evidence to explain their meaning was not admissible. It was error to admit contemporary deeds containing the expression "coal bed" for that purpose. (The court below, relying upon

intrinsic evidence and the opinion of Conyngham, J., in *Gloninger v. Franklin Coal Co.*, 55 Pa. 9, had held that "coal bed" was synonymous with quarry. "a working made on the front or face of the vein at the particular place.")

Indiana.

Indianapolis Gas Co. v. Pierce, 36 Ind. App. 573, 76 N. E. 173 (1905). See this case on page 150.

Pittinger v. Ramage, 40 Ind. App. 486, 82 N. E. 478 (1907). An oil and gas lease required lessee to sink seven wells within a fixed time, and gave him the right to retain ten acres of the land for each well sunk. Lessee completed but two wells, whereupon lessor brought suit to quiet title to all but twenty acres of the tract, said twenty acres being selected by lessor. Held, in the absence of an agreement describing the premises reserved for each well, the lessor cannot arbitrarily set off twenty acres as a reservation for the two active wells and have his title quieted as to the rest, but the choice is upon lessee upon whom demand must be made. If he does not act within a reasonable time, the courts may be called upon to do so.

New York.

Jones v. Mount, 74 N. E. 1032 (1905). An oil and gas lease provided that if eight wells were not drilled within a fixed time the lessee should surrender his right to drill all of the land excepting ten acres for each well drilled. The lessee drilled but one well, whereupon the lessor sought to quiet title for all of the tracts except ten acres. The bill was dismissed because there was no method for determining the description of the land to which the lessee was entitled as appurtenant to the well drilled.

Ohio.

Fowler v. Delaplain, 79 Ohio, 279, 87 N. E. 260 (1909). An oil lease granted "the exclusive right to mine for and produce petroleum and natural gas from and the possession of so much of 430 acres of land as may be necessary therefor; lessee is to have all the rights and privileges necessary for the proper use and enjoyment of this lease." "The lease contains no stipulation authorizing the lessee to sublet to his employes any of the surface for barns, residences, yards, gardens, pasture lots, etc., as accessory to and convenient for the operation of the lessee's mining privileges; but the right to the surface is expressly and clearly restricted to so much as may be 'necessary' for mining and producing; that is for stationing and operating machinery, tanks, pipes, and the like, with the right of passage to and from the same."

Pennsylvania.

Lynch v. Burford, 201 Pa. 52, 50 Atl. 228 (1901). B. leased to L., for the purpose of drilling and testing for oil a tract of five acres, part of his farm "subject to a reservation surrounding farm buildings and marked by stakes, and as a protection against fire." The lessor was held to have no right to drill a well on this reservation. The lessee's rights were exclusive, and applied to the entire tract, but in locating wells he was confined to the ground outside the reservation. The object of the provision was the protection of the lessor's buildings, and it did not reserve to him any right to take oil.

King v. New York & Cleveland Gas Coal Co., 204 Pa. 628, 54 Atl. 477 (1903). When the description in a deed or devise is clear and explicit and without ambiguity, there is no room for construction or for the admission of parol evidence, to prove that the parties intended something different.

Where the petition by an executor for an order to sell real estate for the payment of debts variously describes the property to be sold as a "body of coal" and "the coal underlying the said real estate" and "the whole of said coal underlying the surface," and the decree based on the petition describes it as "the coal and privileges" mentioned in the petition, and the executor's deed describes it as "the coal underlying the testator's land hereinafter described," it is error in a subsequent ejectment by persons claiming under the will of the testator to permit the plaintiffs to offer parol evidence to show that the coal mentioned in the executor's deed was the Pittsburg vein only, and not other coal underlying the land.

In re Redstone Oil, Coal & Coke Co.'s Dissolution, 207 Pa. 125, 56 Atl. 355 (1903). A written contract for the sale of coal provided as follows: "It is mutually agreed by the parties hereto that all coal and surface land agreed to be conveyed hereby shall be surveyed and for any number of acres of coal not delivered there shall be deducted two hundred and fifty dollars per acre from said consideration, per acre for coal owned, and one hundred dollars per acre for surface, as the result of said survey shall determine." There then followed a schedule headed thus: "The property included in the coal mine or coal plant hereinbefore referred to is substantially as follows." Then after enumerating several particulars the following words occurred: "Coal unmined about three thousand five hundred acres available coal." It appeared that out of the whole acreage mentioned about thirty-eight acres had been mined out by the grantors, and the parties agreed that there should be deducted for this deficiency two hundred and fifty dollars per acre. It also appeared that a creek ran over the land, and that a railroad had been constructed over it. The purchasers claimed that the coal under the creek and the railroad was not available coal within the meaning of the contract, and that it could not be mined without flooding and without destruction of the surface. The evidence showed that the coal both under the creek and under the railroad could to a large extent be mined out by leaving proper supports, but that

this could only be done at a greatly enhanced cost. Held that the coal under the creek and the railroad was as a fact available, although at a loss. "As to the question of law, the legal interpretation of the writing, we agree with the auditor in holding, that 'the parties to the contract contemplated a deduction for the deficiency in the absolute acreage of the coal delivered and not for the deficiency in the available acreage.' The object, in view of both parties, was the sale of the entire property of the grantors; it was also agreed that the coal and surface should be ascertained by survey and for any acres of coal not 'delivered' a deduction should be made; all the acres of coal forming the subject of the contract were delivered except the 37.84 acres already mined out by the grantors. The creek and the railroad were on the land conspicuously before the eyes of both parties; it was as well known to them at the date of the contract as at any time since, that coal seams underlaid both and that acreage under both would, in a deed describing the property, convey the underlying coal; or adopting the language of the parties would 'deliver' it, yet no stipulation against paying for these acres was made; no reference by name signifying such intention was intimated. The word 'available' occurs in the schedule in this connection: 'Coal unmined about three thousand five hundred acres available coal.' The obvious purport of these words is, that some acres had been mined, therefore that was not available and should be deducted; they in no reasonable sense modify or change the sweeping import of the previous words, that there was only to be a deduction 'for any number of acres of coal not delivered.'"

West Virginia.

Higgins v. Round Bottom Coal & Coke Co., 63 W. Va. 218, 59 S. E. 1064 (1907). A deed granted the northeastern section of a large tract known to contain coal, also the privilege, should the grantee, his heirs or assigns open a coal mine on the tract granted, "of undermining southward beyond the lines of said tract so far as not to injure the tract of land of which this was a part and now taken from." Held that this conveyed title to the corpus of the coal in the residue of the tract lying to the south and southwest of the parcel granted, openings for the removal of said coal, however, to be only through the tract granted in fee.

B. Fixtures and Appurtenances.

p. 127.

Alabama.

New Connellsville Coal & Coke Co. v. Kilgore, 50 So. 205 (1909). A signal rope in a coal mine which extends from the hoisting engine on the top of the ground into the mine, used to signal the engineer, is a part of the ways, works, machinery or plant. Likewise, a skidway built of tim-

bers in a coal mine on which a bucket is operated to hoist coal and timber out of the mine by a rope attached to the bucket from a hoisting engine on top of the ground, pursuant to signals given to the engineer by a wire connected with the engine and extending down into the mine, is, with the bucket, a part of the plant.

Arkansas.

Cherokee Const. Co. v. Bishop, 86 Ark. 489, 112 S. W. 189, 126 Am. St. Rep. 1098 (1908). A mining lease required lessee to pay taxes on the improvements which were not to be removed until full royalty had been paid, lessor being given a first lien on all such improvements and machinery to secure the royalty; but lessee might remove the machinery subject to the conditions of the lease. Held such improvements and machinery were not fixtures, lessor's only interest therein being a lien for unpaid royalty.

Illinois.

Consolidated Coal Co. v. Savitz, 57 Ill. App. 659 (1894). A. leased to B. all the coal and other minerals under a tract of land "together with all buildings, air shafts, machinery, mine boxes, tools, supplies and appliances thereto belonging or appertaining." A side track from a railroad passing over the property, which was built for use in connection with the mine and for no other purpose, which was necessary for the transportation of the coal, without which the mine was practically useless and of which the lessee took possession, was an appurtenance of the leased premises and passed therewith "as a necessary part thereof, even without the use of the word appurtenances." This side track having been removed by the railroad company, the lessee was liable to the lessor for permissive waste.

Hewitt v. Watertown Steam Engine Co., 65 Ill. App. 153 (1895). A steam engine used to operate an electric mining plant by lessee, and capable of removal without injury to the mine, was held to be a chattel in an action of replevin by the vendor of the engine.

Hewitt v. General Electric Co., 164 Ill. 420, 45 N. E. 725 (1896). See 61 Ill. App. 168 (vol. 1, p. 128), reversed on another point, but approved as to point there stated.

Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902 (1906). A proviso in a mining lease authorizing the lessee to remove machinery, etc., as he may deem advisable, from its present to other locations upon the demised premises, together with a proviso that, at the end of the term, the lessee surrender possession of the premises in good condition as an entire mining property, leaving all shafts, etc., so that lessor, by exercising ordinary skill in mining, might continue the work with the machinery on the mines to mine unopened mines, authorizes the removal of hoisting machinery from an unsafe to a safe shaft, but does not contemplate that the structures so moved shall be returned

to their original locations, or that lessee shall rebuild structures on the premises abandoned and unused when the lessee took possession, and subsequently destroyed by fire through no fault of the lessee.

Gillespie v. Fulton Oil & Gas Co., 239 Ill. 323, 88 N. E. 192 (1909). A lease of the oil and gas in certain premises for the term of five years, and as much longer as oil or gas is found in paying quantities, provided that if oil was found the lessor was to have one-eighth of the product, but that, in case no paying well was completed within five years, the lease was to be null and void. On a bill for an injunction and account against one claiming under a subsequent lease, a decree was entered in which the defendant was inter alia ordered to deliver up all personal property on the leasehold. This was held to be erroneous so far as it covered machinery and materials brought upon the property by the defendant and used in drilling wells or pumping, conveying and storing the oil produced, and not being a part of the wells themselves. "The complainant had no title to the premises, nor even to the oil or gas under them. What he acquired by the lease was merely the right to go upon the premises and explore for oil or gas, and if found, to produce them according to the letter of the lease. It is this right which the defendants invaded. The fact that they did so did not forfeit their ownership of the property which they brought on these premises, even though it was used in prosecuting their illegal operations, nor did it transfer such ownership to the complainant."

Indiana.

Perry v. Acme Oil Co., 80 N. E. 174 (1907). As a general proposition, whatever is annexed to the realty becomes, in contemplation of law, a part thereof, and subject to the same rules of property as the soil itself. This is the case with casing and drive pipes placed in oil wells in the construction thereof which become a part of the wells and the removal of which would destroy the wells. Hence, where an oil lease provided that the lessee might "remove all property at any time," and also provided that the failure to operate any one well for sixty days or to pay a penalty therefor, should work a surrender to the lessor, the right of removal upon the failure to operate or to pay the penalty was only for a limited time and only embraced trade fixtures which could be easily removed. It did not extend to property which had ceased to belong to the lessee and had become part of the realty. Upon a surrender that became the property of the lessor, who was not liable to the lessee for its value.

Perry v. Acme Oil Co., 88 N. E. 859 (1909). Machinery and fixtures placed on real estate, leased for the purpose of drilling for gas and oil, do not become permanent fixtures nor parts of the freehold by reason of such annexation as is necessary to develop the premises according to the terms of the lease, and title to such machinery and fixtures does not vest in the lessor because of a forfeiture of the lease. Where the right to remove property "at any time" has been expressly reserved in the lease, such

a right is not unlimited as to time, but is limited to a reasonable time after the expiration of the lease.

Kentucky.

Kamer v. Bryant, 103 Ky. 723, 46 S. W. 14 (1898). R. owned a tract of six acres upon which there was a stone quarry, and upon which he built a switch and switch track connecting the quarry with a railroad. R. conveyed to H. a portion of this tract, "and the appurtenances and privileges thereunto belonging," and H. and his successors in title continued to work the quarry and to use the switch and track which was upon the remaining land of R., who acquiesced in this use. R. then sold to K.

Held, 1st, that the right to use the switch passed to H. and his grantees by the appurtenance clause above quoted, as interpreted by the conduct of the parties; 2nd, that the right to this use was an easement by prescription; 3rd, that this being the only practical way to use the quarry, the switch was a way of necessity which passed by the grant of the land to H.

Duff v. Bailey, 29 Ky. Law Rep. 919, 96 S. W. 577 (1906). The lessee in an oil and gas lease having abandoned the same, the lessor destroyed and sold the machinery on the property belonging to the lessee. It was held that the latter could recover damages therefor. After the lease had expired the lessor could have compelled the lessee to remove the machinery, and upon his failure to do so within a reasonable time, might have removed them, doing no more injury than was reasonably necessary, and charging the cost to the lessee; but even though the leaving of the machinery upon the property was a trespass by the lessee, the lessor had no right to destroy it or convert it to his own use.

New York.

Massachusetts Nat. Bank v. Shinn, 18 App. Div. 276, 46 N. Y. Supp. 329 (1897). A lease of all the iron ore on certain land and the right to mine the same, in which the lessee covenants among other things to timber the shafts, "which timbering, shall, at the termination of this lease, or any renewal thereof, be regarded by the parties as fixtures," and which further contains covenants providing that in the event of a surrender of the lease the lessee will permit a re-entry by the lessor 20 days before actual surrender for the purpose of enabling the lessor to instal pumping machinery to keep the mine from filling with water, and that the lessee will, if the lessor so desires, at the expiration of the lease or any renewal thereof, "sell to the lessor all the mining machinery, buildings and other erections" upon the premises at a valuation, and if such purchase is not made, the lessee shall have 60 days in which to remove such machinery, buildings or other erections, indicates an intention that the mining plant to be erected by the lessee shall remain personal property and that the lessee shall have the right to remove it, provided he exercises that right

before the term expires, or in any event before yielding up possession of the leased premises; and a mortgagee of the machinery and trade fixtures acquires the right to remove them under the same circumstances.

Where the lessee, however, fails to exercise such right, either before or at the time of his ejection for nonpayment of rent, and no action to foreclose the mortgage is brought until four months thereafter, the right of the mortgagee to remove the fixtures is lost.

Ohio.

Siler v. Globe Window Glass Co., 21 Ohio Circ. Ct. R. 284 (1900). A tenant under an oil and gas lease has the right, upon the expiration of the term or upon abandonment of the wells because unproductive, to draw and remove the tubing, casing, and drive-pipe from the well, they being trade fixtures.

Niece v. Percy, 29 Ohio Cir. Ct. R. 219 (1906). Under the usual practice in oil fields respecting negotiations concerning the sale or mortgage of a lease in operation, the equipment is regarded as part of the lease, all the personality on the property following the lease. In judicial sales the terms of the decrees themselves fix the subject-matter of the sales. If, however, a decree is construed to pass the lease only, but nevertheless the equipment is sold with it through the connivance of the lessee, he is subsequently estopped to claim the equipment.

Pennsylvania.

Wick v. Bredin, 189 Pa. 83, 42 Atl. 17, 43 Weekly Notes Cases, 323 (1898). A grant of coal underlying a tract of land provided for forfeiture for nonpayment of royalty and also that the lessee should "have the right to abandon said lands and mining at any time and remove all their buildings and fixtures." Boilers, engines, pumps, scales, etc., placed on the property by lessee for the purpose of mining, were not fixtures, did not become part of the realty, and did not pass to the lessor upon a forfeiture. Their character was not determined by the fact of physical attachment but was a question of intention, and the above quoted clause established an intention to treat them as personality.

Beech Grove C. & C. Co. v. Mitchell, 193 Pa. 112, 44 Atl. 245, (1899). Where a lease provides that improvements made by the lessee shall remain at the expiration of the term, but expressly excludes "mules, mine or coal cars, powder, mine rails and tools" from the lease, the provision relates to the things leased and the lessee may remove a haulage system which has been introduced to take the place of mules, where it appears that such a system was not in general use when the lease was made, that its introduction was not contemplated by either party, and that it was an appliance which could be removed without injury to the land and could be used in another mine.

Cassell v. Crothers, 193 Pa. 359, 44 Atl. 446 (1899). When an oil lease runs for a term certain and for so long as oil is found in paying quantities, the lessee has a reasonable time after the expiration of the lease in which to remove his machinery, but he cannot recover it by ejectment.

Smith v. Hickman, 14 Pa. Super. Ct. 46 (1900). Plaintiff leased land to defendants for five years "and as much longer as oil or gas is found in paying quantities." The lease provided, "It is further agreed that if gas is found in paying quantities, the consideration * * * shall be \$500 per annum. * * * In case gas is not found in sufficient quantity to market, the party of the first part can, if he wishes, have the gas by paying ordinary price for casing and rig." Lessee worked the land for 10 years and then abandoned it. Held that the lessor had a right to the casing and rig upon paying its value. The right was not taken away by the fact that gas had been found, i. e., discovered. "The word 'found' when it referred to the lessee had the same meaning as 'obtained'; when applied to the well it meant 'supplied'".

Linden Oil Co. v. Jennings, 207 Pa. 524, 56 Atl. 1074 (1904). Where a lessee under an oil lease entered upon the leased premises with notice of a claim of a prior lessee, and the prior lease is subsequently adjudged valid, the owner of the prior lease has no right to take possession of personal property placed on the premises by the owner of the subsequent lease, nor even of property attached to the land, where the subsequent lessee has the right to remove such property under his agreement with the landowner.

"It is argued for appellants that the casing, rig, etc., became fixtures and thereby part of the land. But this would not help the case. Appellants were not lessees of the land but only of the right to explore for and produce oil from it. The right to property attached to the land and left on it as fixtures would not be in appellants but in the lessor as landowner, and by his lease to plaintiff he gave the latter the right to remove all such property placed on the land by it."

Utah.

Couch v. Welsh, 24 Utah, 36, 66 Pac. 600 (1901). The lessees of a mining claim may, at the expiration of the lease, remove buildings and railroad tracks erected by them during the term on the demised premises, if the lease does not provide expressly to the contrary, and if such removal does not cause any material injury to the realty.

IV. THE SUBJECT OF THE LEASE AND THE RIGHT OF THE LESSEE TO MINERALS NOT ENUMERATED IN HIS LEASE.

p. 130.

Alabama.

McCombs v. Stephenson, 154 Ala. 109, 44 So. 867 (1907). The word "minerals" as used in conveyances of mineral interests in lands includes all substances in the earth's crust which are sought for and recovered for the substance in itself; it is not limited to metallic substances, but includes salt, coal, clay, stone of various sorts, petroleum, natural gas, etc. A deed conveying the "coal, ores and other minerals and metals" in certain lands, conveys the shale in the land also.

Colorado.

Isabella Gold Min. Co. v. Glenn, 37 Colo. 165, 86 Pac. 349 (1906). A mining lease demised "all of the veins outcropping within and belonging to the southeasterly five hundred feet of the C. Lode mining claim." This was held to include not only all veins which outcropped within the territory indicated, but also all other veins which apexed therein, although they did not outcrop on the surface, these veins being veins which belonged to the territory indicated.

Illinois.

Smoot v. Consolidated Coal Co., 114 Ill. App. 512 (1904). See this case on page 39.

Cantrall Co-operative Coal Co. v. Level, 139 Ill. App. 104 (1908). See this case on page 148.

Kentucky.

Jones v. American Ass'n, 120 Ky. 413, 27 Ky. Law Rep. 804, 86 S. W. 1111 (1905). Where the habendum of a deed excepted all the coal banks in the land granted, and at the time of the making of the deed the land was wild and there was no commercial development of coal mines, the exception will be construed to include not only the opened mines, of which there were none, but all the veins of coal in the ground.

McKinney's Heirs v. Central Kentucky Natural Gas Co., 120 S. W. 314 (1909). The words "other minerals" or "other valuable minerals," taken in their broadest sense, would include oil and gas underlying the land deeded, but if the circumstances of the sale showed that the parties did not contemplate a conveyance of oil or gas, the right to the same will be held not to have passed.

Michigan.

Weaver v. Richards, 156 Mich. 320, 16 Det. Leg. N. 117, 120 N. W. 818 (1909). The use of the words "mineral" or "minerals" without any qualification would include both oil and gas, and therefore a reservation of minerals in place in the earth would include both gas and oil, coupled with the right to prospect, explore for and remove these minerals.

New York.

Brady v. Smith, 181 N. Y. 178, 73 N. E. 963 (1905), reversing 88 App. Div. 427, 84 N. Y. Supp. 1119, and *Brady v. Brady*, 31 Misc. 411, 65 N. Y. Supp. 621. A conveyance of land contained the following exception: "Excepting and reserving therefrom unto the parties of the first part, their heirs and assigns forever, all mines and minerals which may be found on the above piece of land, with the right of entering at any time with workmen and others to dig and carry the same away." A part of the land was largely covered with limestone or granite rising above the natural surface, and the chief value of this part consisted of this stone. It was held that the term minerals in the above exception did not include this stone.

"The first point to be observed is that the word 'minerals', as used in this reservation, is coupled with 'mines' by the conjunctive—'all mines and minerals'. This shows that the grantor had in mind the reservation of mines and their contents, to wit, 'minerals'. This is further emphasized by the word 'found', 'which may be found on the above piece of land'. It appears in the findings that immense boulders and ledges of limestone crop out on the surface of these premises, and it would be a strained and unnatural construction to assume that the language commented upon above refers to stone lying open to the view, and that the same may be removed by open quarrying and blasting, destructive of the surface, under the reservation, of 'all mines and minerals which may be found'. * * The word 'dig' has a technical meaning, when the context is considered, and does not apply to open quarrying and blasting.

"It is true, under scientific definition, the world of matter is divided into three general subdivisions, animal, vegetable and mineral. It is equally true that in the ordinary phraseology of mankind a mineral is a word limited largely to metallic substances". "Each case must be decided upon the language of the grant or reservation, the surrounding circumstances and the intention of the grantor if it can be ascertained. The adoption of arbitrary definitions in reference to mineral substances buried in the earth is not permissible. The word 'mineral' standing by itself might under a broad, general, popular definition, embrace the soil and all that is to be found beneath its surface; under a strict definition it might be limited to metallic substances, and under a definition coupling it with mines it covers all substances taken out of the bowels of the earth by the process of mining." (The same deed came up for construction in 1902 in the U. S. Circuit Court of Appeals for the Third Circuit in *Phelps v.*

Church of Our Lady, Help of Christians, 115 Fed. 882, where *Brady v. Brady*, 31 Misc. 411, 65 N. Y. Supp. 621, was followed because it was binding as the law of the state in which the land was situate.)

Gcnet v. Delaware & H. Canal Co., 163 N. Y. 173, 57 N. E. 297 (1900), Id., 186 N. Y. 422, 79 N. E. 437 (1906). See these cases on page 154.

Ohio.

Detlor v. Holland, 57 Ohio, 492, 49 N. E. 690, 40 L. R. A. 266 (1898). A conveyance was in the following terms: "Do hereby grant, bargain, sell and convey to D., his heirs and assigns forever, all the coal of every variety and all the iron ore, fire clay and other valuable minerals in, on or under the following described premises * * * together with the right in perpetuity to the said D. * * * of mining and removing such coal, ore or other minerals and the said D. * * * shall also have the right to the use of so much of the surface of the land as may be necessary for pits, shafts, platforms, drains, railroads switches, sidetracks, etc., to facilitate the mining and removal of such coal, ore or other minerals and no more." This did not pass the oil and gas, and a gas and oil lease by D. to others was void.

1. It was held that the deed was to be construed in the light of the development of the neighborhood at its date. At that time oil was produced in small quantities within from 10 to 20 miles of the land, but there was nothing to show that the parties knew this.

2. The incidents granted as above are all such as are "peculiarly applicable to the mining of minerals in place" and not to such as are in their nature of a "migratory character".

"The words 'other minerals' or 'other valuable minerals,' taken in their broadest sense, would include petroleum oil; but the question here is did the parties intend to include such oil in the mining right." Taking all the terms of the conveyance in the light of surrounding circumstances, in view of the above rule of construction, and *Dunham v. Kirkpatrick*, 101 Pa. 36, it is concluded that the oil did not pass.

Pennsylvania.

Dunham v. Kirkpatrick, 101 Pa. 36 (1882). An exception in a deed of "all the timbers suitable for sawing, also all minerals," does not include petroleum oil. "It is true that petroleum is a mineral; no discussion is needed to prove this fact. But salt and other waters, impregnated or combined with mineral substances, are minerals; so are rocks, clays and sand; anything dug from mines or quarries; in fine, all inorganic substances are classed under the general name of minerals. But if the reservation embraces all these things, it is as extensive as the grant, and therefore void. If, then, anything at all is to be retained for the vendor, we must, by some means, limit the meaning of the word 'minerals.'" "Certainly, in popular estimation, petroleum is not regarded as a mineral substance any more

than is animal or vegetable oil, and it can, indeed, only be so classified in the most general or scientific sense. How, then, did the parties to the contract under consideration, think and write? As scientists; or as business men, using the language and governed by the ideas of every-day life?

"As we have before observed, if this reservation is to have a strictly scientific construction it is as extensive as the grant, hence, works its own destruction; on the other hand, if we adopt the popular understanding we cannot regard petroleum as a mineral." "They were doubtless, at that time, unaware of the character of the property as oil territory. But if they did entertain such an idea, and expected to reserve oil under the general term 'mineral,' they were mistaken, and should have known that they were using that word in a manner not sanctioned by the common understanding of mankind, hence, in a manner that could not be approved by the courts of justice."

Verdolite Co. v. Richards, 7 Northampton Co. R. 112 (1899). The right given by a lease to take "soapstone only" from the demised premises will not restrict the lessee from the removal of such other deposits as are absolutely an incident to the enjoyment of that right. But although what is necessary to the enjoyment of the demise passes with it as an appurtenance that which is merely important, useful or convenient, does not. There is an implied covenant not to mine other minerals, the breach of which will be enjoined.

Snouden v. Cavanaugh, 10 Kulp, 1, 7 Northampton Co. R. 264 (1900). A deed of the surface of a lot of land excepted and reserved all the coal, minerals and metals in and under said lot, with a right to mine and remove the same. Held that an open stone quarry which was on the premises at the time of the conveyance did not fall within such reservation, but passed under the deed. "It is true that the word 'surface' has been technically defined to mean that part of the land which is capable of being used for agricultural purposes. * * * But on the other hand the word 'surface' may be used, in a secondary sense, to denote the whole of the soil lying over a mine, whether such soil itself contains minerals or not. * * * And when, as here, there is a grant of all the surface of a certain lot of land, * * * and a portion of this area is flat quarry stone, exposed to full view and not covered by any soil, it seems * * * that the plain, simple intent expressed is to convey this whole area, whether soil or stone, and that to give the word 'surface' its technical meaning would pervert the plain intention of the parties."

Burton v. Forest Oil Co., 204 Pa. 349, 54 Atl. 266 (1903). "The learned trial judge was right in excluding the testimony offered for the purpose of showing the trade meaning of the word 'gas' used in the lease between the plaintiff and Guffey and Queen. The purpose was to show that in the oil and gas business the word 'gas' as used in such contracts means gas derived from a gas well and not from an oil well. The lease granted the right to drill and operate for 'petroleum oil or gas' and provides that if gas is obtained in sufficient quantities to utilize, the consideration there-

for should be \$500 per annum for each well drilled on the premises. The meaning of the word is neither ambiguous nor uncertain, but is well understood. Nor does the connection in which it is used give it a meaning requiring parol evidence to explain it. The offer was in effect not to explain, but to contradict, the explicit provisions of the contract, by showing that the lessees were to pay for the gas only on condition that it was produced or derived from a gas well. This would have been in direct opposition to the agreement and in conflict with its terms. The lease, as we have seen, granted the right to drill for oil and gas, but the consideration to be paid for the gas did not depend on whether it was derived from an oil well or a gas well, but whether the gas was 'obtained in sufficient quantities to utilize.' Parol evidence is not admissible for the purpose of making a new and different agreement for the parties and hence the evidence, the rejection of which is complained of by the appellant, was properly excluded."

Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 Atl. 486, 103 Am. St. Rep. 1005 (1904). In a conveyance of land there was a reservation of "all coal and other minerals in, under and upon said land." A subsequent conveyance contained a reservation of minerals as fully as in the previous deed and further of "all the gravel necessary for any fill or ballast for the railroad." It was held that sand was not within these reservations. "In the broadest sense, as belonging to one of the three great divisions of matter, animal, vegetable and mineral, sand is a mineral. In the more restricted scientific sense, sand may or may not be a mineral according to what it is composed of."

"But there is another, and what may be called the commercial sense in which the word mineral is used, and in which having reference to its supposed etymology of anything mined, it may be defined as any inorganic substance found in nature, having sufficient value separated from its situs as part of the earth to be mined, quarried or dug for its own sake or its own specific uses. That is the sense in which it is most commonly used in conveyances and leases of land, and in which it must be presumed that it was used by these parties in the deed in question. 'Coal and other minerals,' the expression used, indicate substances, which, like coal, have a value of their own, apart from the rest of the land, sufficient to induce the expense and labor of severance for their own sakes. These the grantor intended and expressed the intention to except from his grant and reserve to himself. While coal was the principal and perhaps the only thing clearly in view, yet the reservation was not meant to be limited to that, for then the addition 'and other minerals' would be superfluous and misleading. A vein of fine marble would clearly be reserved, and so probably if near enough a market to have a value, would be granite, or limestone or other building material, potter's or porcelaine clay and the like.

"Sand might or might not be in this category. A vein of pure white quartz sand, valuable for making glass or other special use, would be within the reservation, while common mixed sand, merely worth digging and removing as material for grading, would not be. The referee has found

that the sand which is the subject of the present contention was of this latter character, and was taken and used not for any intrinsic value or use of its own, but as part of earth and other material to fill up the road-bed to the proper grade."

Hendler v. Lehigh Valley R. Co., 209 Pa. 263, 58 Atl. 488 (1904). See this case under chap. XXII.

Silver v. Bush, 213 Pa. 195, 62 Atl. 832 (1906). F. conveyed to B. a tract of land "except the mineral underlying the same, and the right of way to and from said mineral, which the said parties reserve." It was held that F.'s successor in title did not have the right to take natural gas from the land. "The crucial question here, as in all contracts, is what was the sense in which the parties used the word. Mineral is not per se a term of art or trade, but of general language, and presumably is intended in the ordinary popular sense which it bears among English speaking people." "The cardinal test of the meaning of any word in any particular case is the intent of the parties using it and all that *Hendler v. R. R. Co.* did was to apply that test to the word mineral in the deeds on which the case turned."

"In the present case the question arises in respect to natural gas, the plaintiff claiming that it was included in the reservation of 'the mineral underlying' the land conveyed. Certainly such gas is a mineral in the broadest sense of the term, but no evidence was given or offered to show that the parties so understood or intended the word mineral, or even that it had acquired a usage in conveyancing which would include gas. In *Dunham v. Kirkpatrick*, 101 Pa. 36, it was expressly held that petroleum was not included in a reservation of 'all minerals,' the court saying, 'In popular estimation petroleum is not regarded as a mineral substance, and can only be so classified in the most general or scientific sense. How, then, did the parties to the contract think and write? As scientists; or as business men using the language and governed by the ideas of every-day life?' It was held, therefore, that petroleum was not within the intent of the parties in reserving the minerals. And, a fortiori, natural gas would not be so included. This decision was part of the law of the state when the deeds in question were made, and to some extent at least, as was said by the learned judge below, it had become a rule of property on which many titles in western Pennsylvania rested. To take any case out of its operation, the evidence should be clear and convincing that the parties used the words in a different sense. The only effort of the appellants in that direction was apparently based on the view of *Hendler v. R. R. Co.*, already referred to, that any substance mined or extracted from the land for its own sake is necessarily included in the word mineral. Under this view offers were made to show that at the date of the deeds the land in that vicinity was already being developed for natural gas, which was known as a marketable commodity. These offers, however, even if proved, were not evidence that the parties used the term mineral in the sense contended for. They could only be ground for inference that the parties might have so intended, while on the other hand

the offers themselves implied that the including of gas under the term mineral would be a new use of the term, and the inference would be strong that if the parties intended to include gas they would have said so expressly. The offers, therefore, were properly excluded."

Hollenback Coal Co. v. Lehigh & Wilkes-Barre Coal Co., 219 Pa. 124, 67 Atl. 987 (1907). By a contract in writing an owner of coal demised, leased and to mine let to another "all that vein or seam of coal known as the Baltimore vein, and the veins, or seams of coal underlying" it. By another clause it was agreed "that at the end of said term the said party of the second part shall leave the mines worked under this lease in such good condition and so far prepared for future workings as that at least one hundred thousand tons of coal can be mined the next succeeding year from the then existing coal workings without injury to, or robbing of the mines." In still another clause it was stipulated that the lessee in consideration of certain rentals should be permitted to "mine and remove from said premises of the veins hereby leased, 100,000 tons of coal of 2,240 pounds each, of a size which will pass over a screen five-eighths inch mesh in each and every year of said term." Held that the lessee could only remove, after mining, such broken coal as would pass over the five-eighths inch meshes, and would be enjoined from using the smaller sizes which had been thrown on the culm bank. It is not material that these smaller sizes had no market value at the date of the agreement.

McMillin v. Titus, 222 Pa. 500, 72 Atl. 240 (1909). The owner of land in 1864, by instrument in writing, granted, bargained, demised and leased the sole and separate and exclusive right and privilege of prospecting, examining and searching for coal, ore, or other minerals, and for salt, oil, carbon oil, or other substances in and upon the land, and the right and privilege to dig, excavate, bore and sink pits and wells for any or all of the said coal, ore, salt, oil, carbon oil, or other minerals and substances and remove the same. The lessees were given the right to erect the necessary machinery and the use of one acre of land at or immediately around each pit or well, and for erecting the buildings necessary for operation, and the free use of as much wood and coal as might be required to operate the machinery in sinking or pumping wells that might be sunk. The consideration was \$300 paid in hand and the further consideration of \$500 to be paid out of oil obtained on the premises. At the time this lease was made oil had been discovered in the neighborhood, and there was the usual excitement accompanying such discovery. The existence on the land of the Pittsburg or River vein of coal was known, but was utilized only for domestic purposes, there being no market for it. Beyond that the lessees and their successors in title never exercised any acts of ownership, except for the purpose of prospecting and drilling for and pumping oil, and vacated and abandoned the premises in 1879. The owners of the land and their successors in title mined and used the coal as fee simple owners. It was held that the above instrument did not pass title to the coal or the right to mine, extract or remove it, but that

it was a lease for oil, gas and salt purposes, and that this lease had been abandoned twenty-three years before the institution of this suit.

Tennessee.

McBurney v. Glenmary Coal & Coke Co., 118 S. W. 694 (1909). "Where a particular mineral, as oil, coal, iron or marble, is conveyed by a specific term covering that particular mineral, and not by a general term, only that would pass, and all other minerals would remain with the property of the owner of the fee; and where a mineral which has been conveyed is taken or removed from the land, the owner of such a mineral ceases to have any other right or interest in the lands, and the land then all belongs to the owner of the fee and surface."

Virginia.

White v. Sayers, 101 Va. 821, 45 S. E. 747 (1903). Three persons owning contiguous lands entered into a tripartite "deed", which stated that the parties intended to explore these lands for minerals, and to work them if found in sufficient quantities, and by which they conveyed, each to the other, such interest to all such mineral as might be found, with the right of access to the lands to mine it, as would make each of the parties the owner of an undivided one-third of all the minerals on the said lands. The parties were to share expenses and profits equally. They at the time contemplated a search for gold upon the lands, but none was found. Almost 50 years later coal was found upon the lands. Held that coal was not included in the term "minerals" as used in the deed or agreement, and the instrument was intended to create nothing more than a partnership between the parties thereto in the prospecting for gold and mining it if found.

West Virginia.

Ammons v. Toothman, 59 W. Va. 165, 53 S. E. 13, 115 Am. St. Rep. 908 (1906). The defendant who owned land, which her ancestor had leased for the production of oil and gas on royalty, conveyed the land and also one-half the oil and gas in the land, "except the well that is now producing oil." That well ceased to produce oil, but the lessee deepened it to a different sand rock stratum and thus again produced oil from it. The grantee claimed one-half of the defendant's share of the oil produced through this well from the lower stratum. It was held that he was not entitled to recover. The exception of the well excepted from the grant the oil produced from the lower sand rock. Since the well actually produced oil, an estate vested in the lessee, and though the well ceased to be productive, the lessee still had an estate under which it had a right to sink the well deeper. The lessee's right was not lost or abandoned, consequently, neither was the right of the defendant. Her right depended

on and was measured by the right of the lessee. The argument that the lessee abandoned the well, so far as the upper sand stratum was concerned, was baseless. There was not a new or different well in any sense; there was only a deeper well. The deed did not except only the oil coming from one sand rock stratum, but all the oil coming from the well, no matter how deep it was sunk.

Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895 (1906). A contract for the sale of realty which, read in connection with deeds and other instruments therein referred to, showed on its face that the subject of sale was part of a certain vein of coal lying partly under a certain tract of land described and conveyed in the deeds referred to in the contract, and separately described and treated as coal in said deeds, and known to the parties to the deeds and contract, in point of existence, area, location and relative position, did not include other veins of coal in said tract of land which were not so known to them.

Sutt v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307 (1908). In West Virginia a reservation in a deed to the grantor of "the right to all minerals in and under" the property, without more, includes petroleum oil and natural gas as well as the solid minerals.

CHAPTER IV.

ASSIGNMENT AND TERMINATION OF LEASE.

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| I. Assignment of the Lease. | C. By Eviction. |
| A. Mortgage of Leasehold. | D. By Forfeiture. |
| II. Termination of the Lease. | E. By Abandonment and Sur-
render. |
| A. By Expiration of Term. | |
| B. By Exhaustion of the Min-
erals. | |

I. ASSIGNMENT OF THE LEASE.

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United States.

Malcomson v. Wappoo Mills, 85 Fed. 907 (1898). C. C. D. S. C. A contract between the lessee of mining land and a stranger provided that the latter would "undertake the mining for his own account. He will agree to mine an average of 400 tons per week and deliver it in cars at \$1.50 per ton payable weekly, etc. Mr. C. is to dig 250 pits in advance, which will not be paid for until final settlement. In consideration of this agreement he will continue to act as superintendent of the works, etc." - This was not an assignment of the term nor a sublease and the contractor did not own the rock mined.

Alabama.

Etowah Min. Co. v. Wills Valley Min. & Mfg. Co., 143 Ala. 623, 39 So. 336 (1905). The lessee of a mine, who had agreed to pay royalty on ore mined, made an assignment for the benefit of creditors. Neither the lessee nor the trustee having paid any royalties, the lessor filed a bill to have a lien declared in his favor on certain property of the lessee. It was held that this bill was not maintainable. The assignment to the trustee did not relieve the lessee of his obligation to pay royalty. The lessor could either have acquiesced in the assignment and looked to the trustee for the royalty or have held the original contracting party. In either case his remedy was by an action at law, and no lien being reserved in the lease, none was given by law.

Colorado.

Caley v. Portland, 18 Colo. App. 390, 71 Pac. 892 (1903). The lessees of a mining claim assigned all their interest therein for \$1,500, the assignee agreeing to work the claim and to pay the \$1,500 out of the net proceeds of the claim. The assignee went into possession and mined the premises for four months, but at a large loss; he accordingly assigned his interest in the lease to another, who mined the property for the remaining seven weeks of the lease, but without obtaining any net proceeds. Held that by such assignment the lessees' assignee did not violate his contract with the lessees, and did not render himself liable absolutely for the \$1,500 stipulated to be paid out of the net proceeds of the mine. The lessees were not in any way damaged thereby. Their assignee was not required to work the property continuously, but only to make a reasonable effort to mine it at a profit. Moreover, his interest was assignable by him, as there was no provision against such assignment in his contract with the lessees, and the character of the work to be performed was not such as to indicate that such contract involved any relation of personal confidence requiring the lessees' assignee himself to perform the work.

Illinois.

Consolidated Coal Co. of St. Louis v. Peers, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624 (1896), reversing *Peers v. Consolidated Coal Co.*, 59 Ill. App. 595 (vol. 1. p. 137). "Where there are express covenants in a lease which run with the land, such as to pay rent, the lessee is bound to their performance by reason of his being both in privity of contract and privity of estate with the lessor, and the privity of contract continues to the end of the term, but by an assignment of the term he terminates the privity of estate. Between the lessor and the assignee of the term there is privity of estate and by reason of such privity the assignee is liable for breaches of any express covenant of the lease which runs with the land or term and which occur while such privity continues to exist." "The rule is, that as the liability of the assignee grows out of privity of estate, and that only, it ceases when that privity ceases to exist, and each successive assignee is liable for only such breaches of covenant as occur while there is privity of estate between him and the lessor." That the assignment by the lessee to the defendant was "subject to the agreements in the lease" did not impose a personal contractual obligation on the defendant.

Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N. E. 219 (1908). Oil and gas leases are assignable the same as other leases.

Indiana.

Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196 (1896). The assignee of a lease of land for the purpose and with the exclusive right of operating for oil and gas is liable for rent accruing thereunder, although he has

never actually taken possession or begun operations under the lease. The responsibility is incurred by accepting an interest under the lease.

The lease contained the provision that its surrender "satisfied all damages between the parties." This applied to the future and not to rentals accrued at the time of surrender.

Breckenridge v. Parrott, 15 Ind. App. 411, 44 N. E. 66 (1896). P. on June 11, 1890, leased to A. for oil and gas purposes, with a covenant that a well should be drilled within one year and in default thereof lessee was to pay annual rental thereafter until the completion of the well. A. assigned the lease to B., who was interested with A. as a partner, on June 15, 1891, and no well having been drilled, B. surrendered it in April, 1892. Held B. was liable for the annual rental for the year beginning June 11, 1891, whether he was a partner of A. or not.

Indiana Nat. Gas & Oil Co. v. Hinton, 159 Ind. 398, 64 N. E. 224 (1902). The agreements of a lessee to pay the rent and to furnish the lessor with gas to heat and light the dwellings on the premises demised are covenants running with the land, and the assignee of the lease is bound to perform them. See this case also on page 132.

Indianapolis Gas Co. v. Pierce, 36 Ind. App. 573, 76 N. E. 173 (1905). P. leased to G. for the purpose of drilling and operating for oil and gas a tract of forty acres for the term of five years, with a provision that a well should be commenced and completed within six months, and in case of failure the lessee should pay a fixed rental for delay. G. assigned the lease to N. Co., and N. Co. assigned to I. G. Co. all its lands and property of every description, including "live leases," and turned over to the latter company a lease register, which purported to show all contracts which had not been canceled, and also all leases which had been canceled or abandoned. The lease in question did not appear on this register. It having been found that the lease from P. to G. was a valid contract, and no well having been drilled, the lessor could maintain an action for rental for delay. It was further held that it was a live lease under the terms of the above assignment and that it passed by that assignment; that it did not appear on the register was no fault of P.'s and the appellant therefore assumed and was bound by its obligation.

Robyn v. Pickard, 37 Ind. App. 161, 76 N. E. 642 (1906). The receiver of a corporation, which was the lessee in an oil and gas lease, sold all of its assets to another corporation, having first been authorized by the court to do so. A subsequent assignee of the lease could not avoid payment of the rent on the ground that there was no assignment by the original lessee. The court being the vendor, the chain of title was perfect. The covenants ran with the land and bound the assignee, whether he took possession and complied with the other conditions or not.

Kentucky.

McGoodwin v. Lusterine Min. & Polishing Co., 33 Ky. Law Rep. 521, 110 S. W. 409 (1908). Where a contract was made by X with plaintiff leasing

him the right to sell minerals on his land "of any kind except oil, gas and salt," and plaintiff assigned to Y and Y to defendant, the latter took the place of Y and assumed all the obligations that Y entered into with plaintiff. Hence, plaintiff had the right to proceed directly against defendant for a breach of the contract.

Missouri.

Geer v. Boston Little Circle Zinc Co., 126 Mo. App. 173, 103 S. W. 151 (1907). A mining lease provided that the lessee should leave sufficient pillars to support the roof of the mine, and that a failure to do so should work a forfeiture. This covenant bound a sublessee whose violation of it was held to result in a forfeiture of the lease.

Ohio.

Woodland Oil Co. v. Crawford, 55 Ohio, 161, 44 N. E. 1093, 34 L. R. A. 62 (1896). See this case on page 69.

Pennsylvania.

Jackson v. O'Hara, 183 Pa. 233, 38 Atl. 624 (1897). A lessee who assigns a half interest in an oil and gas lease is liable jointly with his assignee for rentals.

Comegys v. Russell, 185 Pa. 283, 39 Atl. 956 (1898). For the facts of this case see 175 Pa. 166, 34 Atl. 657 (vol. 1, p. 140). "On this last trial the testimony was somewhat different. There was some evidence from which the jury might find that no royalties were due to support the forfeiture of the lease and the re-entry when made. There was also evidence that the plaintiffs expended time and money on the property upon the faith of the alleged declarations of the defendant that no royalties were due or demandable. This evidence was necessarily for the jury and their finding adversely to the defendant disposes of the case."

Watt v. Equitable Gas Co., 8 Pa. Super. Ct. 618, 43 Weekly Notes Cases, 215 (1898). An assignee of an oil and gas lease is not liable to the lessor upon a covenant to drill a well upon the demised premises, when the covenant matures after he has assigned the lease to another (see vol. 1, p. 138, *Washington Nat. Gas Co. v. Johnson*, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553, followed).

Fisher v. Guffey, 193 Pa. 393, 44 Atl. 452 (1899). F., the lessee in certain oil leases, assigned them to T. for \$500, and "the further consideration of the sum of \$1,000 if oil is found in any well drilled on any of the territory herein described and said well or territory be further operated by" T. or his assigns. The obligation to pay this \$1,000 did not run with the land and it could not be recovered from T.'s assignee.

McClaren v. Citizen's Oil & Gas Co., 14 Pa. Super. Ct. 167 (1900). A. leased to B. for oil and gas purposes in consideration of one-eighth of the oil produced, and \$200 per annum for each gas well if gas was obtained

in paying quantities. B. assigned to C. and by various assignments the lease became vested in the defendants. The defendants assigned to M. the privilege of drilling for gas and taking and selling it, and M. agreed to apply the proceeds of the sale of the gas to the payment of rental and royalty due on the lease and to the expense of carrying on the gas business, and of the balance to pay defendants one-fourth. Held, defendants were liable to A. for rental. The assignment to M. did not terminate that liability.

"The liability of an assignee of the lessee of an oil and gas lease for the rents and royalties which accrue to the lessor is founded in privity of estate. He takes the lease with notice of its covenants, and is liable for all breaches thereof which occur while he holds the title, but is not liable for such as happen after he ceases to be privy to the estate of the lessee. Each successive assignee is liable for covenants maturing while the title is held by him."

"The defendants retained the estate created by the lease to Book, in privity with which they then were, and carved out of it a new leasehold estate in the lands, upon terms which assured them a substantial benefit and for their own profit. When the assignee of a leasehold estate executes a lease of the premises reserving a larger rent or containing covenants more advantageous to the lessor than those found in the original leasehold, he reserves to himself a benefit derived under the original lease and his privity of estate is thus continued. He does not convey the estate which he had accepted as assignee of the original lessee, but creates a new estate, to which he assumes the character of landlord."

MacDonald v. O'Neil, 21 Pa. Super Ct. 364 (1902). "The assignee of a lease of land for oil and gas production is liable to the lessor for the payment of all rents and royalties which accrue while he holds an assignment of the lease."

Utah.

Ober v. Schenck, 23 Utah, 614, 65 Pac. 1073 (1901). Where a lease provides that it shall become void upon a sale or transfer of the property by the lessor, held that the "transfer" which would avoid the lease would be a transfer of title, and not merely a transfer of possession.

West Virginia.

Comley v. Ford, 65 W. Va. 429, 64 S. E. 447 (1909). An instrument granting the right to mine and remove the coal in a tract of land for a period of years, and "to take all necessary, usual or convenient means for working and taking away the said coal," which was held to create an estate for years in the land, was assigned, but the assignee did not covenant to pay rent to the lessor, and did not enter into possession. There was no liability by such an assignee to the lessor for breach of the covenants of the lease.

A. Mortgage of Leasehold.

p. 141.

Pennsylvania.

Speer's Assigned Estate, 10 Pa. Super. Ct. 518 (1899). Leasehold mortgages are wholly dependent on the acts of Assembly of April 27, 1855, and May 13, 1876, for their validity as liens, and unless there is a substantial compliance with the requirements of the statutes, the mortgagee acquires no rights as a lien creditor. The requirements of the act of May 13, 1876, as to the recording of leasehold mortgages, is substantially complied with when the lease and the assignment thereof are recorded, and the mortgage, which is also recorded, refers to the record of the lease and the first assignment, and recites in full an unrecorded assignment from the first assignee to the mortgagor.

LeFerre v. Armstrong, 15 Pa. Super. Ct. 565 (1901). A mortgagee of a leasehold interest who fails to record his mortgage until after judgment is entered and execution issued on a prior debt, the holder of which had no knowledge of the mortgage, cannot divest the lien of the execution creditor by giving notice at the sale. The execution creditor takes in preference to the mortgagee.

II. TERMINATION OF THE LEASE.

A. By Expiration of Term.

p. 142. Where the term is fixed and the lease is a true lease creating the relationship of landlord and tenant, the subject is governed by the law of that relationship. Where the instrument conveys all the minerals and the estate is limited to a term of years, the estate comes to an end with the expiration of that term, whether the minerals be all mined out or not. What remains then reverts to the grantor or his assigns, and the tenant no longer has the right to mine and no longer has any property in the minerals.

Frequently in oil and gas leases, the term is not for a fixed time absolutely, but is qualified by the additional words "and as much longer as gas and oil are found in paying quantities," or some similar or equivalent expression. This does not qualify the character of the estate but renders uncertain the time of its expiration. If the designated minerals are not found in paying quantities, or being found are exhausted before the termination of the fixed period, the lease is then at an end. If they are found within that period, then the lease endures as long

as the minerals are produced in paying quantities. This means not as long as it is possible under any circumstances to produce them in paying quantities, but as long as they are producible by the system of development adopted by the lessee. Subject to the express requirements of the lease, he may exercise his own judgment, if he does so in good faith. The term "paying quantities" means paying the lessee or operator, and what production is profitable is, unless actual profit is made, for him to decide. When the production ceases to pay, it is incumbent upon the lessee to notify the lessor of the fact and of his purpose to surrender the premises. Until he does so he is liable under the covenants of the lease.

Indiana.

American Window Glass Co. v. Williams, 30 Ind. App. 685, 66 N. E. 912 (1903). An oil and gas lease demised certain premises for ten years, and as much longer as gas or oil was found in paying quantities, or a certain specified rental paid to the lessor. If gas was found on the premises in paying quantities the lessees were to pay to the lessor \$100 per annum for each well drilled from the time the lessees used the gas therefrom for manufacturing purposes. Until a well was drilled, the lessor was to be paid an annual rental of \$50 for the premises. The lessees drilled a well and found gas in paying quantities, but closed and anchored it, and did nothing further to explore and develop the land. Held that the rent of \$100 per annum did not commence until the lessees used the gas from the well drilled for manufacturing purposes, and the lessor was not bound to be content with a rental of \$50 per annum longer than ten years. If, at the end of ten years, such a condition had not arisen, pursuant to the terms of the contract, as to entitle him, under the contract, to the larger rental, he was not bound by the contract for a longer period than the ten years. He might then regard the principal and essential consideration of the contract as having ceased to be longer existent, and might declare the contract ended.

Indiana Nat. Gas & Oil Co. v. Pierce, 34 Ind. App. 523, 68 N. E. 691, 73 N. E. 194 (1903). A lease of the exclusive right to drill for oil and gas for five years, or as long as oil or gas shall be found in paying quantities, the lessee to commence operations within six months or in lieu thereof pay the lessor \$80 per annum, is ineffective after five years if the lessee never drills a well or takes possession of the land under the lease for any purpose. Under such circumstances the relation of landlord and tenant never existed between the lessor and the lessee, and at the end of any year either party could terminate any rights granted or received under the instrument; the one by refusal to accept, and the other by refusing to pay the stipulated sum.

Chaney v. Ohio & Indiana Oil Co., 32 Ind. App. 193, 69 N. E. 477 (1904). An oil and gas lease for the term of one year, and so long thereafter as oil and gas can be produced in paying quantities, is for a definite term of one year, and this term, if enlarged, must be the result of the production of gas or oil in paying quantities within the year specified in the lease itself. If such a contingency does not happen, then the lease expires, and is of no avail between the parties at the end of the year, and the lessee cannot, after the expiration of the year, assign the lease to another.

Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149 (1904). See this case on page 209.

American Window Glass Co. v. Indiana Natural Gas & Oil Co., 37 Ind. App. 439, 76 N. E. 1006 (1905). An oil and gas lease was executed "for a term of 12 years and so long thereafter as petroleum, gas or mineral substances can be procured in paying quantities or the payments hereinafter provided for are made according to the terms and conditions attaching thereto." The lessee had 12 years to develop the land, provided he made the annual payments, at the end of which time, if the land remained undeveloped, the lease became forfeited, the word "or" meaning "and". If the lessee developed and found ore in paying quantities, then the lease ran on.

Acceptance of rent for the thirteenth and fourteenth years did not operate as a renewal for another term of twelve years, but made the lessee a tenant with the right to a reasonable notice before the lessor can oust him, what is a reasonable time being a matter for the jury. The acceptance of the rent after the twelfth year is an election not to turn the lessee out then, but the continuance is for no fixed period, but merely a reasonable time after notice to quit.

Diamond Plate Glass Co. v. Knote, 38 Ind. App. 20, 77 N. E. 954 (1906). A gas lease provided that it should expire whenever "gas ceases to be used generally for manufacturing purposes" or whenever the lessee failed to pay the prescribed rental. Gas having ceased to be used for manufacturing purposes in the neighborhood, the lease was at an end and the lessor could not thereafter recover rental.

Kansas.

Buffalo Valley Oil & Gas Co. v. Jones, 75 Kan. 18, 88 Pac. 537 (1907). The term of an oil and gas lease was for two years, or so long as oil and gas is found, and the lessee diligently develops the land and markets the product. The failure of the lessee to use reasonable diligence in development of the land terminates the lease. What constitutes reasonable diligence is a question for the jury.

Kentucky.

Bay State Petroleum Co. v. Penn Lubricating Co., 121 Ky. 637, 27 Ky. Law Rep. 1133, 87 S. W. 1102 (1905). Where an oil lease provides that

it is to run for a fixed term "or so long as oil, gas, or any of the above substances are found in paying quantities," the lessee has the right to determine when he is no longer obtaining oil or other minerals in paying quantities, and if he so determines he may terminate the lease.

Hazel Green Oil & Gas Co. v. Collier, 33 Ky. Law Rep. 495, 110 S. W. 343 (1908). An oil and gas lease was made February 23, 1903, for "the term of three years from date hereof and as much longer as oil and gas is found, provided wells are completed during said term as hereinafter provided." This lease provided that if gas is found in sufficient quantities to market the same and be piped away from the premises to such market, the consideration to the lessor shall be \$100 a year "for each well as long as the gas from said well is marketed;" and also that the lessee should sink a test well on the land within one year. "Reading these provisions of the lease together, we think it manifest that the writing draws a distinction between the test well, which it provides for, and other wells. In other words, 'provided wells are completed during the said term' means that other wells are to be completed during the term, besides the test well, and that the mere sinking of a test well during the term, without marketing the gas found in it, does not entitle the lessee to an extension of the term beyond the three years."

Ohio.

Northwestern Ohio Nat. Gas Co. v. Davis, 9 Ohio Cir. Ct. R. 551 (1895). An agreement conferred on the company the right to explore for oil or gas on a large tract of land for 5 years "and as much longer as oil or gas is found in paying quantities." D. subsequently acquired a portion of this tract and the separation of this from the rest of the tract was recognized by the payment by the company to her of the rental for the wells on her land. Five years having expired, one of these wells having been abandoned and the other being worthless, it was held that the lease had expired so far as it affected the lands of D.

Blair v. Northwestern Ohio Nat. Gas Co., 12 Ohio Cir. Ct. R. 78 (1896). Under a lease for the production of oil and gas for five years and as much longer as oil or gas is found in paying quantities, a well was drilled which produced gas in paying quantities for more than five years, and the annual rental therefor was promptly paid. It was held that the lessee was entitled to a reasonable time after that well was exhausted to drill at other locations on the premises to explore for oil or gas, and for that purpose and during that time the lease continued in full force.

Detlor v. Holland, 57 Ohio, 492, 49 N. E. 690, 40 L. R. A. 266 (1898). A lease granted "the sole and exclusive right to produce petroleum and natural gas" from a tract of land "specifically granting to * * * for and during the term of ninety days from this date and as much longer as oil or gas is found, operated and produced in paying quantities." There was a covenant to drill a well in 90 days and thereafter one well each succeeding 90 days until four had been completed; and also a provision

that the lease should be terminated by violation of any of its conditions. No well was drilled within 90 days and the lessor notified the lessee that the grant had expired. The lessor then drilled wells, and claiming under another title refused to pay royalty.

"The contract * * * was not a lease of the lands, but only a grant of the sole right to produce petroleum and natural gas for and during the term, etc." If one well had been drilled in 90 days, the grant would have been extended "as much longer, etc." No well having been drilled in 90 days, there was no such extension and the right ceased at the expiration of the time limited in the grant. There is no question of forfeiture. This not being a case of rescission or forfeiture but of expiration of the term, the grantor was not obliged to repay the cash consideration of the grant.

Northwestern Ohio Nat. Gas Co. v. City of Tiffin, 59 Ohio, 420, 54 N. E. 77 (1899). A lease or license to operate upon land for natural gas or petroleum, granted for a specified term of years, and as much longer as oil or gas is produced or found in paying quantities on the land, expires at the end of the specified term, unless within that time oil or gas is obtained from the land in the designated quantities.

Brown v. Fowler, 65 Ohio, 507, 63 N. E. 76 (1902). In an oil and gas lease, no term was mentioned in the granting clause, but the habendum was for two years and as long thereafter as oil or gas is found in paying quantities, not exceeding in the whole 25 years. "This clause means that the term of the lease is limited to two years, but that if within the two years oil or gas shall be found, then the lease shall run as much longer thereafter as oil or gas shall be found in paying quantities; but if no oil or gas shall be found within the two years, the lease shall at the end of two years terminate, not by forfeiture, but by expiration of term; and after the expiration of two years no further drilling can be done under the lease; and even if oil or gas or both shall be found within the two years, the whole term of the lease must terminate at the end of twenty-five years from the date of the lease."

The lease further provided that if no well were drilled within a year the lease was to become null and void unless the lessee should pay for further delay at the rate of one dollar per acre per year until a well was drilled. This means "that the lease may be made to terminate in less time than two years, that is at the end of twelve months, by a failure to drill a well on the premises within the twelve months; but that the lessee may prevent such termination * * * by paying for the delay at the rate of one dollar per acre at or before the end of each year thereafter until a well shall be drilled: that is, the payment must be made at or before the end of the second year of the lease and that further delay cannot be had beyond the term of two years fixed as the lifetime of the lease."

No oil or gas having been found on the premises within two years, the lease terminated absolutely, and could not be extended by payment for delay. See this case also on page 70.

Murdock-West Co. v. Logan, 69 Ohio, 514, 69 N. E. 984 (1904). An oil lease for and during the term of 60 days from the date thereof, "and as much longer thereafter as oil or gas shall be found in paying quantities," contained the following language: "The drilling of one well to be commenced on these premises within 60 days from the execution of this lease, unavoidable delays excepted, and in case of failure to commence drilling of a well within such time as herein specified, the parties of the second part agree to pay the parties of the first part, for such delay, the sum of \$50 per month from the time limited for completing such well, payable by check in advance or directly to the party of the first part, and the parties of the first part agree to accept such sum as full consideration and payment for such delay until one well shall be completed unless this lease is surrendered before said payment is due. It is hereby expressly agreed that a failure to commence, prosecute and complete the drilling of any well or wells or to pay any rental hereinbefore mentioned within the time limited for the same, shall render this lease null and void." This language is ambiguous, and whether the payment of \$50 per month as therein stipulated may be construed as payment of rent, thereby extending the term of the lease, as claimed by the lessees, or whether it must be construed as a payment of liquidated damages for delay, as is claimed by the plaintiffs, is not decided; but on the hypothesis that the term was extended for 60 days in addition to the original term, the lessees could not hold over longer than such additional time unless they actually found and produced oil in paying quantities within that time. A finding of indications of oil, or of the existence of conditions which rendered it probable that oil in paying quantities would be found if the well were operated in a certain way, is not sufficient, of itself, to extend the term of the lease.

The stipulation in the lease that the term shall continue "as much longer thereafter as oil or gas shall be found in paying quantities" requires that oil or gas shall be actually discovered and produced in paying quantities within the term.

Upon the hypothesis that the payment of \$50 per month under the stipulations of the lease was payment of rent, the failure of the lessees to pay \$50 for the month from April 22, 1900, to May 22, 1900, rendered their lease null and void from and after April 22, 1900.

Griner v. Ohio Oil Co., 26 Ohio Cir. Ct. R. 521 (1904). An oil lease contained the provision "The terms of this grant shall not exceed twelve years." The lessees claimed that the word "terms" applied only to the conditional or collateral matters attached to the grant and not to the grant itself. The court held otherwise; that the grant was limited to the period of twelve years and that all rights under the lease terminated upon the expiration of the twelve years.

Zeller v. Book, 28 Ohio Cir. Ct. R. 119 (1905). Under an oil lease, the term of which was five years or as long as oil or gas be found in paying quantities, the lessee is the sole judge of the profitableness of operating the wells, and so long as the operation is profitable a court of equity will not cancel the lease on the ground that the land does not warrant the sinking

of more wells, or because it is questionable whether it will pay a profit on the investment therein; nor will such a lease be canceled because of failure to operate, if the failure is the result of causes not within the control of the lessee.

Pennsylvania.

Lake Erie Gas Coal & Coke Co. v. Patterson, 184 Pa. 364, 39 Atl. 68 (1898). The owner of a life interest in certain coal and of a fee in other coal leased all of it to a coal company for a term of years. The lessee owned the land lying between the coal which the lessor owned in fee and that which he owned for life. The lease provided as follows: "The said party of the first part hereby guarantees peaceable possession of the premises hereby leased during the term of this lease, and agrees and binds himself that if the said party of the second part should be legally dispossessed thereof, to pay and reimburse the said party of the second part for all improvements made upon the said demised premises by them. * * All covenants herein bind executors, administrators and assignees." At the time of lessor's death nearly all the coal owned by the lessor for life, and only a small portion of that owned by him in fee, had been taken out. The representatives and heirs of the lessor executed an instrument in writing that the lessee should not be dispossessed until the end of the term. Held that the lessee had no right to have the lease canceled upon the death of the lessor.

Cassell v. Crothers, 193 Pa. 359, 44 Atl. 446 (1899). On April 22, 1887, defendant leased to plaintiff's assignor a tract of land for the sole purpose of operating for oil and gas for the term of 10 years, "and as long thereafter as oil or gas is found in the land in paying quantities," for a royalty of one-eighth of the oil produced and an annual rent for each productive gas well. Oil was found in paying quantities, but no gas. On April 22, 1897, five wells were in operation, in July four wells, in November three wells, and on November 14, 1897, they were not producing in paying quantities and plaintiff shut down, locked up the tools and his employees left the land. In April, 1898, defendant entered, took possession and began producing oil. Plaintiff brought ejectment. Held she could not recover. There was no abandonment or forfeiture of her rights under the lease, but on November 14, 1897, when oil or gas was not being produced in paying quantities, the lease became subject to termination, and was terminated by defendant's entry.

McIlvaine, P. J.: "The parties fixed the term of the lease at ten years which expired on April 22, 1897, but they provided in case oil or gas was being profitably mined at the end of this term that it could be extended to another date to be fixed by the failure of the land leased to yield oil or gas in paying quantities. When this uncertain date was capable of being made certain, then the lease could be terminated, and after that date the lessee, if he did not surrender the premises, was a tenant at will, and the landlord could at any time enter and repossess himself of the premises

demised, and after such entry the rights of the lessee to the oil and gas, even if it was afterwards discovered in paying quantities by the landlord, would be terminated. The true interpretation of the words 'as long thereafter as oil or gas is found in the land in paying quantities' is not 'as long thereafter as oil or gas can be found in the land in paying quantities by any one,' so as to give the lessee a tenancy until all the oil and gas in the land shall be exhausted, but is this, 'as long thereafter as oil or gas is actually being found in the land in paying quantities under such developments as the lessee has seen fit to make under her covenants in the lease.'

* * * After the failure to produce oil in paying quantities the plaintiff's rights are limited (if the defendant elects to terminate the lease) to the removal of his machinery and to a possession for a reasonable length of time that this may be accomplished." There is nothing in the nature of a tenancy from year to year.

"The unique character of an 'oil lease' makes it somewhat difficult to apply the well established rules that, under the common law, apply to the ordinary lease where the relation of landlord and tenant, pure and simple, is created. In an oil lease the 'lessor' and the 'lessee' sustain a dual relation to each other. In a sense they are landlord and tenant, but they also sustain the relation of 'grantor' and 'grantee' of an interest in lands. The lessee is a tenant as to the surface of the land so far as it may be necessary to carry on his mining operations, but as to the oil in the land after it is discovered by the drill he is the 'grantee,' the owner in fee simple. The lessor for the occupancy of the surface of the land does not, as is usual with landlords, receive a rent, a compensation payable periodically, nor does he receive part of the produce of the land leased; he receives part of the land itself, a royalty, a part of the oil mined and oil in place is real estate. The tenancy of the plaintiff in this case, which alone related to the surface of the defendant's land after April 22, 1897, was not in consideration of the payment of a sum of money periodically made, but depended upon the continued production of oil in paying quantities, or, stated negatively, upon the exhaustion of the mineral that was being mined. The moment that oil was not being produced in paying quantities, and that fact was ascertained and declared, that moment the right to occupy the surface for oil and gas purposes ceased, regardless of the fact that the termination of the fixed term of the lease was on April 22, 1897."

Judgment was entered for plaintiff for the land described "for oil and gas purposes and for the oil and gas in said land".

Young v. Forest Oil Co., 194 Pa. 243, 45 Atl. 121 (1899). "The phrase 'found or produced in paying quantities' means paying quantities to the lessee or operator. If oil has not been found and the prospects are not such that the lessee is willing to incur the expense of a well (or a second or subsequent well as the case may be), the stipulated condition for the termination of the lease has occurred. So also, if oil has been found but no longer pays the expenses of production. But if a well being down pays a profit, even a small one, over the operating expenses, it is producing in 'paying quantities' though it may never repay its cost, and the operation

as a whole may result in a loss. Few wells except the very largest repay cost under a considerable time; many never do, but that is no reason why the first loss should not be reduced by profits, however small, in continuing to operate. The phrase 'paying quantities' therefore is to be construed with reference to the operator, and by his judgment when exercised in good faith."

Briggs v. Elder, 22 Pa. Super. Ct. 324 (1903). The lease was for the term of nine months from November 6, 1897, and contained a covenant that it should remain in force "so long as oil is found in paying quantities, providing all conditions are complied with." The consideration for the grant was the sum of \$40 paid in cash. The lessees covenanted to go upon the ground and fully complete one well within nine months from the date of the agreement, and further, which is the clause upon which plaintiff bases her right to recover: "In case a well is not drilled and completed within nine months, then second parties are to pay the first parties \$25.00 per month until this lease is surrendered or oil is found in paying quantities." This agreement created an estate for a definite term, which could only be enlarged by the discovery of oil in paying quantities within the definite period. The defendants never entered upon the ground, did nothing under the agreement, and there were no further dealings or negotiations between the parties relating to the premises. They were not, therefore, liable to pay \$25 per month after the term of nine months had expired. The estate created by the lease and all its incidents determined and ceased when the definite term came to an end. It was not necessary to surrender the instrument. The surrender of a lease is the yielding up by the tenant of his estate to the landlord. But the term having expired, the defendants had no estate to surrender.

Summerville v. Apollo Gas Co., 207 Pa. 334, 56 Atl. 876 (1904). An oil and gas lease was "for and during the term of two years from the date hereof and as much longer as oil and gas are found in paying quantities, or the hereinafter described rental is paid." A well was sunk which produced a million feet of gas per day, worth when piped and conveyed to market from three to five cents per thousand feet, but none of it was sold or disposed of. The lessor's successor in title, contending that the gas was not produced in paying quantities unless it was sold at a profit, brought ejectment after the expiration of two years. The direction of a verdict for the defendant was held not to be error.

"It may be that for some time the lessee was not able to find a purchaser for the gas, but that was not the affair of the lessors; they were not interested in the proceeds of the sale of the gas. Their rights under the agreement extended only to the receipt of a stipulated annual rental for each well, and the free use of gas for domestic purposes. Beyond this, the question of whether or not the quantity of gas was profitable was for the decision of the lessee. It may be that the final disposition of the product of the well was such as to amply remunerate it for the delay in finding a market."

(The court treats the question involved as one of forfeiture for failure to find oil or gas in paying quantities. It seems clear that this is a misuse of terms, and that the question really is whether or not the term had expired.)

Wilson v. Philadelphia Co., 210 Pa. 484, 60 Atl. 149 (1904). Under an oil and gas lease for the term of fifteen years and so much longer as oil and gas could be produced in paying quantities, gas was found and for a time produced. The lessee agreed to pay a fixed sum per annum for the gas from each well when utilized, and the right was given to him to surrender the lease at any time, from which time it should be null and void. In an action for rent the lessee defended on the ground that it had ceased to use the wells on account of their failure to produce gas. In the absence of notice to the lessor, this was held not to show a termination of the lease, and the lessee was liable for the rent.

The right of search under the contract was one thing and the right to operate for a period of years another. If the search is successful then the right of extended possession accrues, which can only be lost by notice of abandonment; but the right of possession to search is gone when the search proves fruitless. When the right of possession for operating purposes has been acquired, as here, by a successful search for the product, the lessee becomes answerable for the stipulated rental according to the terms of the agreement and is relieved of that liability only by showing payment, or notice to the lessor, either written or verbal, of abandonment.

Gearhart v. Gwinn, 32 Pa. Super. Ct. 567 (1907). An agreement for the sale of coal in place, after setting out the manner in which payment should be made, provided: "Should default be made in such payments or should said party of second part, in the opinion of said Bell, fail to use due diligence in mining coal, then, at the option of said Bell, this agreement to be null, void and at an end." A notice in the following form was sufficient to terminate the agreement. "In the meantime you will do nothing further in the coal matter. I refer to the written license I gave you to mine certain coal under land bought by me at sheriff's sale as the land of the Great Bend Coal Company. The written license in question gave me the authority to terminate the contract at my option and now I terminate it. It may be, when I see you, that we can come to satisfactory arrangements for the future, but, under the present circumstances and conditions, I desire the contract to be at an end."

Testimony as to whether mining had been pursued with due diligence was irrelevant. That was a question to be determined by Bell.

West Virginia.

Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566 (1896). A lease of land for oil purposes for one-eighth of the product was to continue for two years "and as much longer as oil or gas is found in paying quantities thereon, or rental paid thereon." The lessee also covenanted to complete a well within one month and in case of failure to pay 15 dollars per

month for such delay. The term rental above does not refer to such payments but to the one-eighth of the oil. The word "or" means "and". The lessee having failed to operate, the lease terminated at the expiration of two years and could not be kept alive by the mere paying of fifteen dollars a month.

Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179 (1907). A lease of coal on royalty was for the specific term of one year, and as much longer as lessee should mine the coal. It contained a covenant on the part of the lessee to begin work the next day, paying royalty every thirty days. No work was done for over two years, and at the suit of the lessor the court decreed a cancellation of the lease. The court based its decision on the ground that in a lease where the inducement is the royalty to be paid, there is an implied covenant to begin work within a reasonable time and that failure to do so worked a forfeiture.

(Although the court puts the decision on the ground of forfeiture, it seems to the authors that there was an actual expiration of term. The fixed term had expired and the lessee was not mining.)

B. By Exhaustion of the Minerals.

p. 145. See, also, chap. II, div. I, and chap. III, div. I.

C. By Eviction.

p. 146.

Colorado.

Isabella Gold Min. Co. v. Glenn, 37 Colo. 165, 86 Pac. 349 (1906). A mere trespass does not amount to an eviction, though it may be accompanied by such acts and committed in such circumstances as to be equivalent thereto. An eviction may be actual or constructive, and any act of the lessor by which his tenant is deprived of the enjoyment of the whole or a material part of the demised premises, or which shows an intent upon the part of the lessor permanently to deprive or seriously to obstruct or interfere with the tenant's quiet and peaceable enjoyment thereof, amounts in law to an eviction.

In an action to recover damages for the breach of a covenant for quiet enjoyment, the eviction being proved, and the extraction of large bodies of ore by defendant being shown, the burden is upon defendant to prove the amount and value of the ores which it removed during plaintiff's lease.

Pennsylvania.

Mathews v. People's Nat. Gas Co., 179 Pa. 165, 36 Atl. 216 (1897). See this case on page 219.

West Virginia.

Knotts v. McGregor, 47 W. Va. 566, 35 S. E. 899 (1900). In a lease for oil and gas there is an implied covenant of right of entry and quiet enjoyment for the purposes of the lease. The covenant of quiet enjoyment in a lease for oil or gas, or other purposes, is not broken by the mere fact, alone, that the lessor makes another lease during the term, of the same premises, whether the first lessee be in actual possession or not, the second lessee not entering.

The covenant for quiet enjoyment implied in a lease for oil is broken by the exclusion by the lessor of the lessee from taking possession for the purposes of the lease, or his withholding from him the possession of the land for the purpose of the lease.

D. By Forfeiture.

p. 147. Further currency has been given to the doctrine that a forfeiture may result from breach of the implied obligation to mine in California and also in Indiana in cases where the purpose and consideration of the lease is the exploration of the land for oil and gas. But elsewhere the courts generally continue to refuse to declare forfeitures except in cases of conditions or express covenants. The Indiana courts, however, place a limitation upon the doctrine by holding that where, by accepting rent or other act, the lessor has condoned or waived the default, he cannot subsequently declare a forfeiture without first giving notice to the lessee to proceed with the development and affording him a reasonable opportunity to do so. In Kentucky, although the rule that a forfeiture could be declared only for breach of a condition or an express covenant has been formerly applied, the Indiana rule has been followed in a recent case.

Indeed in all cases where rental for delay has been accepted, the lessee is entitled to notice and a reasonable time within which to begin operations before a forfeiture is enforced against him. When the ground of forfeiture is the failure to pay rent only, demand must first be made, and unless a place of payment is fixed in the lease, this demand must be made on the premises.

In spite of the "determined and persistent struggle of parties for a different rule," it is now firmly established and practically unquestioned that provisions for the forfeiture or termination of estates by the breach of covenants to develop the land or to pay

rent are for the benefit of the lessor and the forfeiture is at his option.

Oil and gas leases frequently contain the provision that the failure of the lessee to commence operations within a fixed time, or to pay a stipulated rental or damages for delay, shall avoid the lease. This provision is sometimes coupled with a covenant to pay rental for delay. If the lease contains such a covenant, the lessor has the option in case of default to bring an action for the rent or to declare a forfeiture. If the lease does not contain such a covenant, the lessor cannot maintain such an action, and his only remedy is forfeiture; which, therefore, is practically at the option of the lessee, who may control the situation by electing whether or no to pay the rental.

Where a lessor has the option to declare a forfeiture or to sue for rental, he must elect which remedy he will pursue. He cannot have both; nor can he forfeit the lease and then sue for arrears of rent, unless the right to do so is reserved in the lease.

United States.

Duffield v. Michaels, 42 C. C. A. 649, 102 Fed. 820 (1900), 4th Circ., reversing 97 Fed. 825 (1899). A lease for oil and gas purposes dated March 16, 1898, provided "this lease to be null and void, and no longer binding on either party, if a well is not completed on the premises within two months from this date, unless the lessee shall thereafter pay monthly to lessor ten dollars per month for each month's delay in completing said well. * * * If operations are not commenced in thirty days from this date, ten dollars extra to be paid for the second month." Operations were not commenced in 30 days nor was a well completed in two months, but on May 24, 1898, the lessees paid \$10 on account of rental and the lessor accepted the same. Held that the lessor could not declare a forfeiture of the lease for nonpayment of rent and that a subsequent lease to other parties on June 21, 1898, without the consent of the first lessees, was void; the payment of \$10 was made in time, because there was no requirement that it be paid in advance, and it would be held to be on account of the delay in completing the well, and not for the failure to commence operations in time, because nonpayment of the sum due for the latter was not ground for the forfeiture.

Plummer v. Hillside Coal & Iron Co., 43 C. C. A. 490, 104 Fed. 208 (1900). 3rd Circ. Failure to pay rent reserved in a coal lease will not work a forfeiture of the lease where the lease itself contains no clause authorizing its forfeiture for such nonpayment. The mere failure to operate a mine, under a lease thereof for a period of 100 years, does not constitute an abandonment thereof justifying a forfeiture. The lessee, under such a

lease, having a vested right in the underlying coal and an estate therein, cannot lose that right or estate during the 100 years, save by release or other proper conveyance or by adverse possession. See this case also on page 37.

Kellar v. Craig, 61 C. C. A. 366, 126 Fed. 630 (1903). 4th Circ. It was made a condition of an oil and gas lease that the lessees "are to protect the lines of the premises hereby leased and pay rental until oil is produced in paying quantities and drill one well every two months after oil is produced in paying quantities until this lease and the premises hereby demised are well developed." It was expressly provided that failure to comply with all its stipulations should avoid the lease. Goff, C. J.: "The bill shows that on the 8th day of May, 1900, the first paying well on said land was completed, and it follows that on that day the inchoate right theretofore existing in appellees to search for oil and gas ripened into a fully vested leasehold estate. If by the abandonment or failure to pay rental, a forfeiture had resulted before the finding of oil had produced such vested right, and the lessor had promptly asked the aid of a court of equity in removing the cloud on his title caused by such forfeited lease, his suit would have been entertained."

"The grounds of forfeiture relied on in this case are for breaches of the lease alleged to have been committed since the vesting of such leasehold estate, and concerning them the court below held that equity had no jurisdiction. After the production of oil under a lease of the character involved in this case, if the lessee, in possession and still producing oil, fails to fully develop the land, or neglects to protect its lines by drilling other wells, we think the lessor's remedy is not by way of forfeiture of the lessee's right to operate under the lease, but by an action for the damages caused by such breaches." "It should be observed here that while the covenants of this lease to 'protect the lines' and to 'well develop' the land are usually considered as express agreements, still, so far as the matters we are now considering are concerned, they must in effect be treated as implied covenants would be, for the reason that they are so indefinite, and that no particular number of wells are required to be drilled nor are any special points designated along the line, or on the land, at which wells are to be drilled."

The covenant to drill one well every two months was complied with by the drilling of the required number, although they had not been drilled at regular intervals of two months.

Big Six Development Co. v. Mitchell, 70 C. C. A. 569, 138 Fed. 279, 1 L. R. A. (N. S.) 332 (1905). 8th Circ. Where a lessor, alleging a forfeiture, files a bill against the lessee to cancel the lease, and enjoin the lessee from mining, the bill is not objectionable because it is a bill to enforce a forfeiture to which equity does not lend its aid. The theory of the bill is that the forfeiture was complete before it was filed, and the defendant was guilty of a continuing trespass.

The ground of the forfeiture being the defendant's breach of his covenants to mine in a workmanlike manner and to support the surface so

that it would not cave, the receipt of rent or royalty after notice of forfeiture did not constitute a waiver thereof.

Breicster v. Lanyon Zinc Co., 72 C. C. A. 213, 140 Fed. 801 (1905). 8th Circ. See this case on page 118. Under the particular language of the lease, the implied covenant for diligent development is held to be a condition for whose breach a forfeiture may be declared.

Although ordinarily equity will not enforce a forfeiture, yet it may do so in unusual cases where the circumstances entitle the plaintiff to relief in equity on other grounds. "Although actually terminated by the acts of the parties and no longer of any force or effect, the lease appears, as spread upon the public records, to be still effective as a disposal of all the oil and gas in the lessor's lands. It embarrasses, if it does not prevent, the exercise of the right to make other disposal of these minerals. This right is constantly and materially diminishing in value by reason of the multiplication and operation of wells on surrounding lands. These acts of the adjoining proprietors, being within their lawful rights, cannot be stayed by injunction pending an action at law against the lessee to establish the lessor's title. The lease is a cloud upon the title to the whole of both tracts. The lessor is in actual possession of both, save a small portion of one occupied by the lessee in the operation of the single gas well. No action at law can be had in respect of what is in the lessor's possession, and while she can maintain ejectment in respect of what is occupied by the lessee, the judgment could not go beyond a determination of the title and right of possession to that particular portion. * * * The mere statement of the situation shows that it is one which is in effect destructive of valuable property, is productive of irreparable injury, and calls for a measure of relief not attainable at law."

The bill is essentially a bill to enforce a forfeiture, notwithstanding its primary and only purpose is to establish a forfeiture as a matter of record and to obtain the cancellation of the thing forfeited. *Big Six Development Co. v. Mitchell*, supra, which seems to adopt another view, differs from this case in that there the primary purpose was to enjoin continuing trespass or waste.

Campbell v. Rock Oil Co., 80 C. C. A. 467, 151 Fed. 191 (1907). 7th Circ. A tract of land was leased for oil and gas purposes for the term of five years from May 20, 1897, "and as much longer as oil or gas are found in paying quantities or the rental paid thereon." The lessee agreed to complete a well within one year, or in default to pay a yearly rental of \$60 until such well should be completed. He did not drill any well prior to 1904, but paid the yearly rental up to May 29, 1904. On March 26, 1904, the lessor notified him that the lease would not be extended beyond May 20, 1904, or delay in operations be allowed beyond such period, or money received for further extension or delay. The court held that under the Indiana cases (*Consumers Gas Trust Co. v. Littler*, etc., below) the lessor "had the right to terminate appellees' privilege of exploration by giving them notice for a reasonable time prior to May 20, 1904, that no further extension would be granted. And appellees could have held over only

by finding oil or gas in paying quantities within such reasonable period." But the burden is upon the lessor to prove that the time given was a reasonable one within which to ascertain whether oil or gas in paying quantities could be found. The notice in this case was insufficient because it was confused and ambiguous.

Doddridge County Oil & Gas Co. v. Smith, 154 Fed. 970 (1907). C. C. N. D. W. Va. To fully enforce the duty of development and operation under oil and gas leases, courts of equity have been led "to modify and to a certain extent reverse its well-established rule of abhorrence of forfeitures, so that such forfeiture is favored, when, instead of working a loss or injury contrary to equity, it promotes justice and equity and protects the owner against the indifference, laches, and injurious conduct of the lessee." But these principles cannot be invoked to enable the landowner to overreach and defraud the lessee. By the terms of the lease in this case, lessee was bound to drill a well within four months and another within four months from the completion of the first. He drilled one well, using machinery belonging to the lessor with the latter's consent. While engaged in sinking a second well the lessee's agent was notified by lessor that he must either pay for the machinery or cease work. The agent ceased work and consequently the four months' period expired before the well could be completed. The lessor thereupon declared a forfeiture, which the court refused to enforce. The remedy of a lessor in such a lease "for failure on part of lessee to further develop the leased premises, or to properly protect the lines thereof from drainage through wells on adjacent property, is ordinarily by action at law for damages, but not by way of forfeiture of the lessee's right to bore or drill for oil."

Duntley v. Anderson, 94 C. C. A. 647, 169 Fed. 391 (1909). 8th Cir. A lease of the exclusive right to operate for oil and gas for ten years provided: "In case no oil or gas well is sunk on the premises within twelve months from this date, this lease shall become absolutely null and void unless the second parties shall pipe gas to within 100 feet of the residence of the parties of the first part, and give the parties of the first part the right to use gas for three stoves and four lights in consideration of lease till well is drilled. If this lease shall be detrimental to the sale of this place, this lease shall be returned to the first party." No well was sunk within twelve months, but subsequently the then holder of the lease piped the gas to within 100 feet of lessor's residence, and the latter accepted and used the gas. This was a waiver of the right to forfeit the lease for failure to sink a well. The oil rights under the lease were afterwards assigned to the defendant, and, in an action to cancel the lease under the last clause above, the lessor cannot succeed so long as he continues to use the gas. This clause provides the power to rescind in case the lease proves detrimental to the sale of land for agricultural or other purposes to which it was then devoted, but not for the mere purpose of disposing of the oil rights at a greater advantage.

Arkansas.

Cherokee Const. Co. v. Bishop, 86 Ark. 489, 112 S. W. 189, 126 Am. St. Rep. 1098 (1908). A coal lease provided that lessee should operate the mines with due diligence, and that at no time during the lease should the mine be idle for thirty days consecutively unless caused by strikes or other causes not within lessee's control on penalty of forfeiture for breach. Equity will enforce a forfeiture which works equity and protects the rights of the parties; hence, where the mine was idle ten months in one year and three months in another, the lease is forfeitable at lessor's option.

California.

Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 Pac. 296 (1903). The lessee in an oil lease has a right to re-enter and take possession of the premises and to terminate the lease for breach of the implied covenant to sink wells and operate them diligently. The lessor has such right to re-enter, not only as against the lessee, but also as against any purchaser of the leasehold interest at execution sale who might claim the right to possession of the premises under it. Nor is the right to insist upon a forfeiture of the lease in an action at law lost by the lessee's tendering royalties to the lessor after the lessor has re-entered and declared such forfeiture, although such a tender would be proper as preliminary to the lessee's maintaining an action in equity to be relieved from the forfeiture. See this case also on page 119.

McIntosh v. Robb, 4 Cal. App. 484, 88 Pac. 517 (1906). The consideration of a mining lease was the payment of royalty in six semi-annual instalments, the first within six months of the execution of the lease. It was held that there was an implied covenant on the part of the lessee to begin work within a reasonable time and proceed with reasonable diligence, and his failure to do so for eighteen months, coupled with the nonpayment of royalty during that period, operated a forfeiture of the lease.

Colorado.

Montrozona Gold Min. Co. v. Thatcher, 19 Colo. App. 371, 75 Pac. 595 (1904). A lease provided that the lessees should sink a shaft by a certain day, or else forfeit the lease. The lessees did not sink the shaft by the day provided, but continued with the work, and mined the ore. Held that the time for the sinking of the shaft was of the essence of the contract, and the lessees had therefore forfeited the lease and must account to the lessor for ore mined by them after the lessor had given them notice of the forfeiture. But the lessees could not be considered willful trespassers within the ordinary legal acceptation of that term, and therefore should be allowed, upon the accounting, the cost of mining, tramming, and hoisting the ore to the surface. "The value of the ore is the amount received from the smelter or ore buyer after deduction has been made for the cost of treatment, sampling, hauling, and railroad freight. If any portion of the ore

has been concentrated, the cost of concentration is a legitimate item of expense for which credit should be allowed appellants" (lessees).

Illinois.

McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622 (1904). Where a lessor has a right to declare a lease forfeited because of a breach of its conditions by the lessee, but, subsequently thereto, he executes a deed of the property to another reciting that it is made subject to such lease, he thereby waives the cause of such forfeiture, and neither he nor his assignee can insist upon such forfeiture.

McConnell v. Pierce, 116 Ill. App. 103 (1904). A lease which granted all the coal, iron ore, clay, oil, gas, and other minerals for a term of fifty years in consideration of a royalty, provided: "It is agreed that as soon as it is settled that the railroad is to be built, prospecting shall commence, and if mineral in sufficient quantities is found the first mining shall be done on this land; if no developments be made within three years this lease is void." The obligations as to prospecting and developing are separate and independent provisions, and in their legal effect on duration of the term are to be construed differently. The former is a covenant for the breach of which an action for damages would lie, and the latter is a condition subsequent, the breach of which operates as a forfeiture and defeats the estate altogether.

Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46 (1908). Where an oil and gas lease gave a right of forfeiture to the lessor if the lessee did not complete a test well on adjoining land within a fixed time, but provided that if a well be not completed on the leased property within a year the lessee should pay a certain rental, if the lessee completes the test well and elects to pay rental on the other, the lessor cannot declare a forfeiture, but is limited to a suit for damages, despite the implied agreement to reasonably develop the land and proceed with due diligence. "The agreement for compensation effectually excludes a forfeiture not stipulated for."

Powers v. Bridgeport Oil Co., 238 Ill. 397, 87 N. E. 381 (1909). Where an oil lease provided that six wells should be drilled upon the land, to be put down at such points as would protect the oil from being drained through wells on adjoining lands, and stipulated further that noncompliance should be ground for forfeiture, equity will declare a forfeiture, although damages might be recovered. An agreement to drill six wells is not met by drilling five wells, and subsequently deepening one of them.

After forfeiture in such a case the court will not sanction the removal of the casings from the wells by the lessee where this cannot be done without destroying the wells.

Indiana.

Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452 (1899). Where a lease provides that, upon a certain condition being violated by the lessee

the lessor may, without demand, notice, or act, re-enter the premises, this is an express waiver upon the part of the lessee of all demand or notice. And even if there were no such waiver, a demand for a re-entry is not necessary where the lessor was already in possession of the premises at the time in question. The mere indulgence or silent acquiescence upon the part of the lessor is not to be construed as a waiver of a breach of the condition of forfeiture. See this case also on page 120.

Gadbury v. Ohio & I. Con. Nat. & Illuminating Gas Co., 162 Ind. 9, 67 N. E. 259, 62 L. R. A. 895 (1903). The lessee's implied obligation to explore and develop oil land, where it constitutes practically the entire consideration for which the grant was made, is such an essential part of the contract as to amount to a condition subsequent, for breach of which the grantor may re-enter. See this case also on page 121.

Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149 (1904). A contract for exploring for natural gas "granted and contracted" twenty square feet of a tract of forty acres, to be located by mutual agreement, for the purpose and with the exclusive right of putting down a gas well thereon. The consideration for the grant was the agreement of the grantee to deliver to the grantor, free of charge during the continuance of the contract, whatever natural gas was necessary for domestic use in his dwelling house, and in addition a rental of \$100 per annum for each producing gas well drilled on the premises. There was a further agreement to pay \$20 per annum until a gas well should be put down. It was further covenanted that "this contract shall be deemed to commence at, and run from the date of signing hereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes, or whenever the second party (the gas company), or their assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of the date of its becoming due. And in the event of the termination hereof, for any cause, all rights and liabilities hereunder shall cease and terminate."

No well was sunk, but the rental for delay was paid for five years. In an action to recover this annual sum of \$20 for the subsequent years, it was held that such an action could be maintained upon the contract in question, and that the obligation to pay was not terminated by the failure to pay. "Such a provision is made for the security of the one who is to be benefited by a fulfillment of the promise, and not for the benefit of the one whose interest lies in nonfulfillment. Such contracts are construed to mean that upon failure of the operator to pay the well rental, or the promised sum for delay in beginning operations, the landowner may elect to put an end to the contract and recover what is due him, or he may waive his right of forfeiture and allow the contract to run, and enforce payments as provided in that instrument. An operator will not be allowed to set up his own default or wrong in discharge of his obligation to a landowner to pay for what he has bought."

"We are unable to see how the principles pertaining to the relation of landlord and tenant are applicable to such a contract as the one before us, either where possession has or has not been taken under the contract.

It seems to have been held in *Diamond Plate-Glass Co. v. Curless*, 22 Ind. App. 346, 52 N. E. 782, and *Diamond Plate Glass Co. v. Echelbarger*, 24 Ind. App. 124, 55 N. E. 233, that similar instruments, granting the right to explore for and remove gas or oil for an indefinite period, are, in effect, leases creating tenancies from year to year, under § 7089, Burn's Ann. St. 1901, which may be terminated by the tenant at the end of any year, without notice." With this conclusion the court does not agree.

Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363 (1904); *Consumers' Gas Trust Co. v. Crystal Window Glass Co.*, 163 Ind. 190, 70 N. E. 366 (1904); *Consumers' Gas Trust Co. v. Ink*, 163 Ind. 174, 71 N. E. 477 (1904); *Consumers' Gas Trust Co. v. Worth*, 163 Ind. 141, 71 N. E. 489 (1904); *Consumers' Gas Trust Co. v. Howard*, 163 Ind. 170, 71 N. E. 493 (1904). An oil and gas lease "sold," in consideration of \$1, all the gas and oil underlying a certain described tract of land, and the right to enter at any time to mine and transport them. No time was fixed for the beginning of operations, nor for the completion of a well, nor was there any covenant by the lessee to drill a well. The lessee, however, was to pay to the lessor a certain sum each year until oil or gas was found in paying quantities, or until, in the judgment of the lessee, oil or gas could not be found in paying quantities. Whenever a well was drilled, the lessor was to have a certain part of the product therefrom. Held that there was an implied covenant on the part of the lessee to explore the premises for oil and gas, which amounted to a condition for breach of which the lessor could declare a forfeiture of the lease, and the judgment of the lessee that was to determine whether or not oil or gas could be found thereon must be an honest and not an arbitrary judgment; it must be a judgment justified by the results of a bona fide investigation. If, however, the lessor, at the beginning of any year, accepted from the lessee the sum to be paid him until oil or gas was found, he thereby waived the right to declare a forfeiture for that year for failure to commence operations. And having thus accepted such payment for several years, he cannot, without reasonable notice and warning of his intention so to do, suddenly refuse to accept it for another year and insist upon a forfeiture for breach of such condition of the lease. If the lessor refuses at the beginning of any year to accept such payment, the lessor is thereupon bound to develop the premises within a reasonable time thereafter, and the failure of the lessee to do so would afford the lessor, at his option, the right to declare a forfeiture of the lease; what is a reasonable time depends upon the circumstances of the particular case. Where the lessor declares the lease forfeited at a time when he is not entitled to it, such claim of forfeiture does not operate as a notice to the lessee to start drilling, since it is equivalent to a denial of the lessee's right to enter upon the premises, and the lessor, having thus created a state of uncertainty by his own conduct, cannot claim a forfeiture for a delay which he himself thus may have induced.

Logansport & Wabash Valley Gas Co. v. Ross, 32 Ind. App. 638, 70 N. E. 544 (1904). Where a lease provides that the lessee should drill a well within three months or in lieu thereof pay to the lessor a certain annual

rental for delay in drilling it, and the lessee enters and drills a well and, no oil being found, abandons it, such abandonment does not of itself work a forfeiture of the lease, there being no provision in the lease to that effect.

Carr v. Huntington Light & Fuel Co., 33 Ind. App. 1, 70 N. E. 552 (1904). See this case on page 121.

Indiana Nat. Gas & Oil Co. v. Leer, 34 Ind. App. 61, 72 N. E. 283 (1904). In consideration of \$10, an instrument granted all the gas and oil in and under a tract of land, the grantees agreeing to drill a well thereon within a year or pay a yearly rental of \$20 until such well was drilled, upon failure to pay which the instrument was to be null and void; the grantor was to receive a certain royalty on the product and to be furnished gas from the well or wells for domestic purposes free of cost; the grantees agreed to furnish gas in lieu of rental by November 1, 1889, or the lease to be null and void. Held that this lease was not terminated by the death of the grantor, even though the grantees had not yet taken possession. But the lease or grant could not be continued indefinitely without an effort to develop the land for oil or gas. But where the grantor had been accepting gas for his dwelling house in lieu of all rentals under the lease, he could not insist upon a forfeiture for failure of the grantees to drill a well on the premises or pay rent.

LaFayette Gas Co. v. Kelsay, 164 Ind. 563, 74 N. E. 7 (1905). See this case on page 122.

Logansport & Wabash Valley Gas Co. v. Null, 36 Ind. App. 503, 76 N. E. 125 (1905). An oil and gas lease provided that the lessee should drill a well within three months, or thereafter pay for further delay a yearly rental until a well was drilled; that a refusal to pay such rental when due would be construed to be a surrender, that a failure to pay should avoid the lease and that the lessee might at any time reconvey and thereby avoid the lease. The lessee having made no entry on the land, the refusal of the lessor to accept the rent after it became due was a sufficient declaration of his intention to treat the lease as void.

Zeigler v. Dailey, 37 Ind. App. 240, 76 N. E. 819 (1906). An oil and gas lease provided that a failure to complete a well within 30 days should avoid the lease unless the lessee paid a fixed sum quarterly, in advance, for each year of the delay. Within the 30 days the lessee paid for an extension, during which time he sank a well which was worthless. He then abandoned the property for three years, after which he re-entered and sank a well which was productive. Held that the drilling of a dry hole, taking down the rig, and removing the machinery from the premises, accompanied by the failure to pay any further rental, terminated the contractual relations between the parties, and the lessee was thereafter without any right to enter the premises.

Diamond Plate Glass Co. v. Knote, 38 Ind. App. 20, 77 N. E. 954 (1906). The facts in this case are the same as in *Hancock v. Diamond Plate Glass Co.*, above. The lease provided, as in that case, that it should expire whenever "gas ceases to be used generally for manufacturing purposes" or whenever the lessee failed to pay the prescribed rental within sixty days

after it became due. The lessee carried the lease by paying rental for some time and then refused to make any further payments, and notified the lessor that it had terminated the lease. It was held that the lease terminated only when gas ceased to be used for manufacturing purposes, and not by the mere fact of nonpayment. The failure to pay gave the lessor the right to declare a forfeiture, if he so desired.

New American Oil & Min. Co. v. Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739, reversing 74 N. E. 37 (1905). A lease granted the right to drill and operate for oil and gas on a certain described tract of land in consideration of the payment of royalties on the product. The lessee covenanted to drill a well on the premises within two months from the date of the lease, or to pay twenty dollars quarterly in advance until such well should be drilled, in default of which payment the lease was to become null and void. No well was drilled and the lessee made five quarterly payments for delay, without any complaint upon the part of the lessor, who began suit to annul the lease ten days after the last of these payments.

"There being no definite time limit within which the well must be constructed, the law intervenes and directs that it shall be accomplished within a reasonable time, at the option of the landowner." The latter might waive performance indefinitely; and if he accepted a valuable consideration for postponement he was as much bound by it as if the end of the paid period was the time limit stipulated in the original contract. There could be no forfeiture before the termination of the quarter last paid for, and then the lessee would be entitled to reasonable notice of the intention to terminate the lease if no well be drilled.

Indiana Natural Gas & Oil Co. v. Beales, 166 Ind. 684, 76 N. E. 520 (1906). Under the terms of a gas lease the lessee was to begin operations within one year, or in the event of his failure, to pay certain fixed sums for delay. He was given 12 years within which to make his explorations, and a provision was made for an extension in consideration of certain payments. No well was drilled for 12 years, but all sums of money to be paid were paid promptly and accepted. Without any notice from the lessor that the lessee must explore or that no further rent would be accepted, the lessor notified the lessee that the lease had expired. It was held that the lessor could not arbitrarily terminate the lease without having first given lessee a reasonable time after notice to commence operations.

Indiana Rolling Mill Co. v. Gas Supply & Min. Co., 37 Ind. App. 154, 76 N. E. 640 (1906). By an oil and gas lease the lessee was given the exclusive right to enter upon the land at all times for the purpose of drilling and operating for oil and gas for the term of one year, or so long as gas or oil was found upon the premises. The lessee was bound to drill a well within six months, or in lieu thereof to pay a rental of free gas until the well was drilled, or the property conveyed, or the lease forfeited by its terms. The contract does not lay upon the lessee the absolute duty of drilling a well within a fixed period, but gives it the option either to drill a well within that period, or to pay a rental of free gas for domestic purposes until said well is drilled. The contract was a continuing one, and,

so long as lessee performed the covenants required by the contract, the lessors could not arbitrarily say that it had expired, or that it had been forfeited. The lessors had a right to demand and have a well drilled, but so long as they accepted the rental agreed upon the contract was binding upon them, and they could not say that the contract had expired or that lessee had forfeited its rights thereunder, until a demand had been made for drilling a well and a reasonable time had elapsed after the demand in which to drill. The acceptance of the rental (the free gas) was a waiver of performance in developing the property during the time such gas was furnished and accepted.

Puritan Oil Co. v. Myers, 39 Ind. App. 695, 80 N. E. 851 (1907). Under an oil and gas lease, lessee was to complete a well within six months, or the lease would become void unless lessee paid quarterly in advance \$30 per year as long as the work was delayed. No well was drilled within the first year. Thereafter lessor notified lessee that he would accept no more renewals, but that work must be begun at once and pushed to completion. Seven months thereafter, nothing being done by lessee, lessor sued. Held the real purpose of an oil and gas lease being the development of the land, the alternative extension was not intended to be indefinite in time at lessee's option, but, upon reasonable notice from lessor, the lease can be avoided if lessee fails to work.

Perry v. Acme Oil Co., 88 N. E. 859 (1909). An oil and gas lease provided, "It is further agreed by second party that when they fail to operate any one well for a period of sixty days, or pay first party one dollar per day from the time they fail to operate said well, the ten acres on which said well is located shall be canceled and returned to first party. Second party shall have the right to remove their machinery from the said ten acres." The mere fact that the land which he might select to reconvey was originally uncertain does not prevent an enforcement of the undertaking according to its terms, the lessee having the power to select the ten acres in question. The provision for forfeiture is for the benefit of the lessor, who may either declare a forfeiture or proceed against the lessee for damages for breach of covenant, at his option.

Where a lease provided for the drilling or operating of oil or gas wells, or, on failure to so drill or operate, the payment of an agreed sum per day to the lessor for such failure or delay, with the further provision that upon failure to drill or operate, or pay the agreed sum, the lease was to become null and void, such a provision is for the benefit of the lessor, and he may either declare a forfeiture of the lease or proceed against the lessee for failure to perform the covenants of the lease. Hence in the latter case the lease remains in effect and the title to the fixtures used in operating the wells is in the lessee.

Kansas.

Edwards v. Iola Gas Co., 65 Kan. 362, 69 Pac. 350 (1902). While a stipulation in an oil and gas lease, providing for a forfeiture of the lease for non-

payment of rent reserved, is inserted for the benefit of the lessor, and is to be strictly construed for his benefit and protection, yet, where the time of payment of such rental is neither in express terms nor by necessary implication made of the essence of the lease between the parties, equity may excuse the default in payment, and will not declare a forfeiture and cancellation of the lease in a case where it would be inequitable and unconscionable to so decree. The lessee had expended a large amount of money in development work, had sunk a paying well and thus increased the amount to be paid under the lease, which was a royalty on the product.

Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 Pac. 625 (1903). Where an oil lease allows to the lessee two courses; one, to drill a well within one year, the other, to pay \$40 annually after the expiration of one year until a well should be drilled, the lease to terminate at the end of five years if no well be drilled within that time, and the lessee drills no well, but pays the \$40 annually, the lessor cannot, within the five years, declare a forfeiture of the lease. "The lease does not, in terms or by implication, require the immediate sinking of a well. * * * The provisions for forfeiture are plain. If the lessee should also fail to pay \$40 annually until a well should be drilled, the lease was forfeitable; and, if no well were drilled in five years the lease was forfeited altogether." In the absence of a stipulation to that effect, a contract granting the right of drilling and operating for oil and gas upon real estate cannot be forfeited for a breach of one of its terms.

Rawlings v. Armel, 70 Kan. 778, 79 Pac. 683 (1905). A general forfeiture clause in a lease of land for oil and gas purposes is to be strictly construed for the benefit of the lessor, and the lease may be forfeited for nonpayment of rent in the absence of a stipulation making time of the essence of the contract, if, under all the circumstances, it would not be inequitable or unconscionable to do so.

Federal Betterment Co. v. Blaes, 75 Kan. 69, 88 Pac. 555 (1907). An oil lease contained the following provisions: "In case a well is not completed within six months * * * lessee will pay to the lessors for delay * * * ten dollars each quarter year thereafter in advance until said well is completed, or lease shall be surrendered. * * * The lessor shall have the right to declare a forfeiture * * * upon failure of lessee to pay any quarter yearly sum. * * * If at any time after a well or wells have been drilled six months shall elapse without any revenue being received by the lessor from said well or wells, and without any further drilling being done by lessee, this lease shall be deemed abandoned and all rights of the lessee thereunder ended." No well was completed within six months, but the quarterly payments were made for more than two years. Three months before the last payment a well was drilled to a depth of one thousand feet and then plugged, and nothing further done. More than six months thereafter the lessor brought suit to cancel the lease. Inasmuch as the evidence showed that a shooting of the well would have been unwarranted, since the drilling showed the presence of oil, the court construed the act of the lessee as a drilling of a well within the meaning

of the contract, and the cessation of work for six months thereafter as an abandonment of the lease. The receipt of the quarterly payment after the drilling of the well did not commit the lessors to the position that a well had not been sunk. When a well had been drilled the lessee had but three courses open to him. (1) To complete it and see that it produced revenue. (2) To so prosecute operations that six months should not elapse without drilling being done. (3) To surrender all claim under the lease. Having failed to pursue either of the first two courses, the lessor might enforce the third.

Davis v. Chautauqua Oil & Gas Co., 78 Kan. 97, 96 Pac. 47 (1908). It was provided in an oil and gas lease, the term of which was for ten years and as much longer as gas or oil may be found in paying quantities, that in case of failure to begin drilling within eight months the lease should become null and void, and that in case no well was drilled within twelve months the lessee should have the option to pay twenty-five cents per acre annually or to lay pipes and furnish gas to the lessor, the lease being binding so long as gas should be thus furnished, provided that, if wells were sunk, royalties should be paid; otherwise the lease to be null and void. It was held that this lease did not provide for a forfeiture for non-payment of the stipulated royalty, but only for a failure to drill wells. Wells having been drilled, no forfeiture could be declared because of the nonpayment of royalties.

Kansas Natural Gas Co. v. Harris, 79 Kan. 167, 100 Pac. 72 (1909). The occurrence of a ground of forfeiture does not of itself work a forfeiture. A condition subsequent in an oil and gas lease that upon neglect of lessee to perform certain covenants the lease shall determine and be void does not render the lease absolutely void upon a default by lessee, but merely voidable at the election of lessor, so that, if he elects to waive the forfeiture, the lessee is bound as though there had been no breach. Where there has been a breach but no forfeiture is declared, and subsequently by conduct or writing a waiver is evidenced, the lease retains its original validity and origin; and a second lease of the same property to another person has no force or effect.

Kentucky.

Thompson v. Brownlee, 20 Ky. Law Rep. 235, 45 S. W. 871 (1898). The rights of a lessor in a mining lease, including his reserved right to forfeit such lease in case of condition broken, are assignable. Where, therefore, the lessee fails to comply with such conditions, the assignee of the lessor may forfeit the lease.

Armitage v. Mt. Sterling Oil & Gas Co., 25 Ky. Law Rep. 2262, 80 S. W. 177 (1904). An oil and gas lease provided that the lessee should drill a well within three years, and commence operations within six months, the lease to become void if the well was not completed within three years, unless the lessee should pay a rental of 10 cents per acre during the time the drilling was delayed. Held that the lessor could not have the lease

declared forfeited because of a failure on the part of the lessee to commence operations within six months. "If the causes for a forfeiture of a lease are distinctly specified and recited therein, courts will not decree such forfeitures for breaches of other provisions of the contract of lease, for which the parties themselves have not prescribed this penalty." But if the lessee did not drill the well within the three years, its rights under the lease would not be extended by a mere offer on its part to pay rent for the premises at the rate of 10 cents per acre if the lessor should decide to treat the lease as at an end.

Monarch Oil & Gas Co. v. Richardson, 30 Ky. Law Rep. 824, 99 S. W. 668 (1907). In an oil and gas lease providing that lessee dig a well within a fixed time or pay an annual rental, development of the land and royalties being the chief object of the execution of the lease, the lessor will be so far protected that the lessee will not be permitted to hold the land for speculative or other purposes an unreasonable time for a nominal rent. But the lessor cannot demand a forfeiture so long as he accepts the rental for the delay in working the land; he must give notice that he will not accept the rent and will call upon lessee to develop the land within the fixed period. If lessee does not then act, his lease is forfeited.

Kimball Oil Co. v. Keeton, 31 Ky. Law Rep. 146, 101 S. W. 887 (1907). See this case on page 135.

Trumbo v. Persons, 118 S. W. 916 (1909). Where one leased the mineral rights in his lands on condition that if the property be idle for thirty consecutive days the contract becomes null and void, on breach of such provision he was not limited to an action of forcible detainer or a bill in equity to cancel the lease, but could sue for possession.

Ross v. Sheldon, 119 S. W. 225 (1909). A lease of coal lands on royalty, for twenty years, contained among other covenants of the lessee the provision that operations should begin within ten days and be planned and worked so as to produce all the coal possible, and that the main entry should be driven at the rate of sixty feet per month. The fact that there was no forfeiture clause in the lease, nor penalty provided for a breach of any of its conditions, did not release the lessee from a reasonable compliance with its terms. It appeared, however, that the operation involved the expenditure of a large amount of money, the establishment of workings extended through a long period of years, and the making of many preliminary arrangements, that the driving of the entry, as provided, was at the start impracticable and later was delayed by the illness of the lessee and the stringency of the money market. And it was held that time was not of the essence of the contract, and that the failure to drive the entry as provided was not a ground for cancellation.

New Domain Oil & Gas Co. v. Gaffney Oil Co., 121 S. W. 699 (1909). The right to forfeit an oil lease is a personal privilege of the lessor, and if he elects to waive it, his act is binding on the rest of the world.

Missouri.

Kirk v. Mattier, 140 Mo. 23, 41 S. W. 252 (1897). See this case on page 54.

Currey v. Harden, 109 Mo. App. 678, 83 S. W. 770 (1904). See this case on page 62.

Brooks v. Gaffin, 192 Mo. 228 (1905), followed in 196 Mo. 351, 95 S. W. 418 (1906). A coal lease provided that the lessee, who owned the adjoining tract, should immediately enter and begin mining so that for the first two years lessee should mine and remove sufficient coal to keep the face of the mine even with the face of the coal on lessee's premises, and should pay for the coal mined at a fixed rate; that he should keep a strict account of the coal mined, make periodical surveys, and mine a certain amount per month or pay a fixed minimum royalty; and further that for breach of any of its terms the lease should be forfeited at the option of the lessor, who should be entitled to re-enter, etc. In a suit in ejectment lessor set up the breach of these conditions by lessee for 16 months; defendant answered, setting up an erroneous survey, ordered by himself, whereby he honestly believed himself not to be on the leased premises. Held there is no room for the application of the doctrine of mistake to this case. Under the terms of the lease it is no defense for lessee to say he did not know he was on the leased premises, for the absolute requirement of the lease was that he should at once enter upon the leased premises. Moreover, the surveyor made his plans under directions of lessee.

Where the contract contains a provision for forfeiture for breach of an essential condition, ejectment will lie for the possession of the premises; a right of re-entry need not be expressly reserved, but such a right is a necessary incident to the condition, and if the condition is broken the right of possession at once arises. The provisions in this lease are not unreasonable and upon breach forfeiture is justified.

Geer v. Boston Little Circle Zinc Co., 126 Mo. App. 173, 103 S. W. 151 (1907). A mining lease provided that the lessee should leave sufficient pillars to support the roof of the mine, and that a violation of this covenant should work a forfeiture. The lessee sublet the land in parcels to various sublessees, one of whom violated the covenant. This was held to work a forfeiture of the lease, rendering it void as to all the sublessees.

New Jersey.

Robinson v. Boys, 61 N. J. Law, 179, 38 Atl. 813 (1897). Where a mining lease reserved a rent of \$400 per year, payable quarterly, to be deducted from the royalties when they were in excess of this amount, and the royalty reserved was also payable quarterly, the lease further providing that if payments were not made at such times the lease should be null and void, the full payment of royalties was due at the end of each quarter, and the failure to pay them worked a forfeiture.

The payment of the rent and royalty was a condition subsequent, and, upon nonperformance, the lessor might re-enter or bring ejectment. He

was not required to make a previous demand for the rent. A subsequent acceptance of a part of the royalties without knowledge of the forfeiture would not be a waiver thereof. Where the existence of such knowledge was in dispute, the question of waiver was for the jury.

Ohio.

Woodland Oil Co. v. Crawford, 55 Ohio, 161, 44 N. E. 1093, 34 L. R. A. 62 (1896). See this case on page 69.

Harris v. Ohio Oil Co., 57 Ohio, 118, 48 N. E. 502 (1897). The breach of the implied covenant to develop oil lands "does not have the effect to forfeit the lease in whole or in part, nor is it good cause for a court to declare such forfeiture, unless the lease in express terms provided that a breach of such implied covenant shall avoid or forfeit the lease."

Kenton Gas & Elcc. Co. v. Dorney, 17 Ohio Cir. Ct. R. 101 (1898). Where an oil lease provided that if a well was not drilled by the lessee within one year the lease was to become null and void, unless the lessee paid to the lessor \$70 each year thereafter until a well was drilled, and the lessee failed to drill the well or pay the \$70, and the lessor, after the year had elapsed, made a new lease to another party, such new lease is to be regarded as an exercise by the lessor of his option to insist upon a forfeiture of the original lease.

Van Etten v. Kelly, 66 Ohio, 605, 64 N. E. 560 (1902). An oil lease which required certain wells to be completed within stated times contained the following: "In case no well is completed within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month in advance while such completion is delayed." Held that this did not constitute a promise or obligation to pay rental, that the lessee had the option to complete wells or pay rental to keep the lease alive, and that upon breach of the agreement to complete wells no action would lie for the recovery of rentals.

Meek v. Cooney, 26 Ohio Cir. Ct. R. 553 (1904). An oil and gas lease provided that in case no well was completed within ninety days from its date the grant should become null and void unless the lessee should pay \$5 for each month thereafter that completion was delayed. No well was ever drilled, and although rent was paid for the first three months after the ninety days, after that nothing was paid. It was held that unless the lessor had waived the condition of the lease in regard to the monthly payments, the lease became void and the lessee would be enjoined from sinking wells. Such a waiver must be shown by clear and convincing evidence.

Crown Oil Co. v. Probert, 28 Ohio Cir. Ct. R. 739 (1905). See this case on page 139.

Pennsylvania.

McCarty v. Mellon, 5 Pa. Dist. R. 425 (1893). The lessee in an oil and gas lease, after having drilled one well which produced oil, and while engaged in drilling a second well, unintentionally made default in the payment of the rental. The lessor, with knowledge of the default, suffered him to continue drilling for nearly two weeks before declaring a forfeiture, when the lessee immediately offered to pay the overdue rental. Subsequently, the lessor tacitly acquiesced in the drilling of a third well. Held that it was inequitable to enforce the forfeiture and that the lessee was entitled to relief against it, although the lease provided for a forfeiture upon default in the payment of rental and expressly made time the essence of the contract.

Mathews v. People's Nat. Gas Co., 179 Pa. 165, 36 Atl. 216, 39 Weekly Notes Cas. 544 (1897). Two lots intended for building purposes were leased by plaintiff to defendant for oil and gas purposes for twenty years. The lessee covenanted to begin operations within three months, and thereafter to pay \$50 per month until work was commenced. It was mutually agreed that "if no well is commenced inside of said six months, the penalty to be a forfeiture of this lease, and neither party being held further". No well was drilled.

It was held on authority of *Ogden v. Hatry*, *Jones v. Gas Co.*, *Phillips v. Vandegrift*, and *Leatherman v. Oliver* (vol. 1, pp. 163, 164), that the forfeiture clause was for the benefit of the lessor, and until he asserted a forfeiture the lessee continued liable for the monthly rental. About a year after the date of the lease, lessor entered on one of the lots and built a house. A stake, however, had been set by the lessee to indicate the site of a future well, and the building would not have materially interfered with the operation. This was held not to be an assertion of forfeiture. "After full consideration we are of opinion under the evidence that neither party so regarded the act at the time." Two years later the lessor conveyed by deed one of the lots to a third party without any reservation of the rights of the lessee. This was held to be a constructive eviction and terminated the liability of the lessee for rent.

Bartley v. Phillips, 179 Pa. 175, 36 Atl. 217 (1897). Mitchell, J.: "This court has firmly established in a line of decisions from *Wills v. Manufacturers' Nat. Gas Co.*, 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603, to *Cochran v. Pew*, 159 Pa. 184, 28 Atl. 219, notwithstanding a most determined and persistent struggle of parties for a different rule, that the clause of forfeiture or termination of the estate is for the benefit of the lessor, and that as against him no act of the lessee can produce that result without his concurrence. Parties therefore who lease or buy, with a term apparently outstanding, without inquiry of the lessee and without the exercise of the lessor's power to forfeit, take the risk of the fact as it may be found by the jury."

For facts see vol. 1, p. 176. Defendants claimed under a deed from *Hartzell*, by which he expressly excepted plaintiff's lease from the cov-

enant of warranty. This distinguishes the case from *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732.

Jackson v. O'Hara, 183 Pa. 233, 38 Atl. 624 (1897). The facts in this case are precisely the same as in *McMillan v. Philadelphia Co.*, 159 Pa. 142, 28 Atl. 220, vol. 1, p. 166, which is followed.

Henderson v. Ferrell, 183 Pa. 547, 38 Atl. 1018, 41 Weekly Notes Cas. 404 (1898). A lease of land for the purpose of operating for oil provided that the lessees should commence operations on the premises within thirty days and upon their failure to do so the lease should be null and void. On the thirtieth day the lessees entered upon the premises, drove a stake to locate a well and unloaded some lumber upon the land. The lessor interfered and denied that they had commenced within the allotted time.

"The lessees had a clear right to enter and commence operations upon the lot on March 5, and if they did so in good faith and with a purpose to continue the work in accordance with the provisions of the lease, the resistance of the lessor to their occupancy of the lot furnished no warrant for a forfeiture of the lease." "Whether they commenced operations in good faith, and whether they intended to proceed with due diligence, were questions for the jury and so was the question whether their failure to continue them was caused by the action of the lessor." The above acts were a commencement of operations if done in good faith and with the intention to continue diligently.

Wheeling v. Phillips, 10 Pa. Super. Ct. 634 (1899). Where it is provided in a lease that failure to perform any of its covenants will render it void, forfeiture is at the option of the lessor, but he may not sue for rent in arrears and also declare a forfeiture.

The lease dated June 22, 1885, provided that lessee should pay \$25 per year until work was commenced. No rent was paid. On June 5, 1897, lessor notified lessee that he declared the lease null and void and also that twelve years' rent was due. Held, he could not recover the rent. "It is to be observed that in this case there is no clause reserving the right to recover accrued payments after forfeiture, such as are not of infrequent introduction and formed a part of the lease in the case of *Wills v. Manufacturers N. Gas. Co.*"

Verdolite Co. v. Richards, 7 Northampton Co. R. 113 (1899). An instrument granted the exclusive right to enter certain lands for the term of three years to dig and carry away the "soapstone only." certain royalties thereon to be paid monthly for this privilege. Upon failure of the lessee to comply with the covenants and conditions of the instrument, the lessor was to have the right to declare the lease terminated. The lessee excavated minerals other than soapstone, but the lessor accepted rent after such operations were being regularly carried on. Held that mere failure in notification or silent acquiescence will not constitute a waiver of the right of forfeiture, but the acceptance of rent after a breach of condition is sufficient to avoid a forfeiture, and there must then be given a reasonable notice that a future breach of such covenant will not be waived.

A mere delay in paying an instalment of rent, if time is not of the essence of the contract, will not work a forfeiture, where the neglect is not willful, and there is evidence of readiness to pay, or some bona fide attempt to comply with the conditions. There must also be a prior demand for the amount of rent due.

West Ridge Coal Co. v. Von Storch, 5 Lack. Leg. N. 189, 7 Del. Co. R. 467 (1899). Where a mining lease provided that notice of the intention on the part of the lessor to declare the lease forfeited must be given, specifying the cause, the notice given must ask no more than the lessor is entitled to under the lease. Where such notice makes demand of a greater amount of royalty than is due, the lessee cannot be divested of his estate for failure to pay the amount claimed, nor need he pay or tender the amount really due in order to avoid a forfeiture. In order to do equity, however, the lessee must pay with interest whatever was due at the time the notice was given, and the royalties on coal mined since that time; he need not pay the minimum royalty due from that time, because, in the face of the notice threatening forfeiture, he could not be expected to prosecute his operations with proper energy, indeed, he would have been justified in suspending them entirely until the threat and danger of forfeiture had been removed.

Marshall v. Forest Oil Co., 198 Pa. 83, 47 Atl. 927 (1901). Plaintiff in ejectment claimed under an oil and gas lease by which he had agreed to commence operations within a prescribed time or pay a monthly rental. The lease contained no provision for forfeiture for nonpayment of rental. The defendant, who claimed under lessor, relied on forfeiture. Held that failure to pay rent was not a bar to plaintiff's recovery. The rental "must be considered as damages, liquidated by the parties to the lease, for the delinquency of the lessee in commencing his operations. The covenant of the lessee was to pay a certain consideration for the forbearance of the lessor, and not that the leased premises were to be held upon a certain condition, violation of which was to be forfeiture."

Walnut Run Coal Co. v. Knight, 201 Pa. 23, 50 Atl. 288 (1901). A coal lease provided that the lessee should pay ten cents per ton royalty, and should mine and ship the coal with all proper and due diligence. The lessee covenanted to mine at least 50,000 tons of coal each year, or pay royalty on that amount. The lease further provided that the lessor could repossess himself of the premises in the event of the failure of the lessee to pay the royalties at the time specified, but he was required to give sixty days' notice in writing of his intention to do so. The lessee went into possession of the premises, and was in possession nearly six years thereafter when notice was served upon him by the lessor. During this time he had only paid \$89 in royalties, although up to the time of service of the notice he had mined over 40,000 tons. There was no evidence offered to excuse the nonpayment of royalties, nor was there any evidence of waiver on the part of the lessor. Held that the lessor was entitled to recover possession in ejectment.

Hays v. Forest Oil Co., 213 Pa. 556, 62 Atl. 1072 (1906). An oil and gas lease provided: "This lease to be null and void and no longer binding on either party if a well is not completed on the premises within three months from this date, unless the lessee shall thereafter pay monthly to the lessor \$500 per month for each month's delay in completing said well; each payment to extend the time for completion for one month and no longer." The lessor could not maintain an action to recover these monthly payments. This case cannot be distinguished from *Glasgow v. Chartiers Gas Co.*, 152 Pa. 48, 25 Atl. 232, vol. 1, p. 165.

"It will be observed that these monthly payments are connected with and have only to do with the forfeiture of the lease which by its own terms expires in three months from its date if a well is not completed at that time. This provision is a protection to the lessor in order that his property shall not be indefinitely tied up while the explorations are being made. On the other hand, if the lessee has not been able to complete a well within three months and still wishes to continue explorations, he can extend the time for completing the well by paying \$500 each month. He does not covenant to pay a monthly rental, but reserves the right to elect to pay \$500 a month, rather than forfeit his lease, until the well is completed."

Drake v. Pennsylvania Coal Co., 217 Pa. 446, 66 Atl. 660 (1907). Unpaid royalties under a coal lease, where no place for their payment is fixed by the lease, must first be demanded on the premises before a forfeiture can be declared.

A coal lease stipulated that in case of forfeiture incurred, an amicable action of ejectment for the lands could be filed and judgment therein forthwith confessed to the plaintiffs by an attorney without a writ of error, appeal or stay of execution, provided that before entering such judgment at least thirty days' notice of the intention to enter it should be given to the lessee, "within which time the rent due and unpaid may be paid, and the forfeiture avoided." Held that the thirty days' notice applied only to a judgment confessed, and not to an ordinary ejectment begun by summons.

Chauvenet v. Person, 217 Pa. 464, 66 Atl. 855 (1907). An agreement whereby the exclusive right to all the minerals in a tract of land was granted for a term of twenty years in consideration of a royalty on ore mined and taken from the premises provided: "It is further understood and agreed that the said lessee shall have the privilege for a period of one year from the date hereof of exploring and digging for ore upon the said demised premises, and that immediately thereafter mining operations must actively commence; and in case the said lessee shall immediately upon the expiration of one year from this date fail to prosecute his mining operations and shall at any time during said remaining term of this agreement for a continuous period of one year fail to dig for, mine, raise and wash iron ore upon which royalty is payable as provided in this agreement, with the view of fully working said lands, then in that case, these presents and everything contained therein shall, at the option of the lessors, cease and be forever null and void, excepting as to the liability of the lessee herein.

It is further understood and agreed that after the expiration of one year from the date of this lease, the lessee must mine and take away at least one thousand tons of iron ore annually or pay the royalty on that amount." It was held that, after the expiration of one year, the lessors could avoid the lease on the lessee's failure at any time to prosecute mining operations for a continuous period of one year; and that this right of forfeiture was not affected by the provision for the payment of a minimum royalty, nor was it waived by the acceptance of that royalty.

"The minimum royalty clause was simply a provision for the payment of a rental during the time the lessee failed to carry on mining operations until the forfeiture should be declared, and was clearly not a covenant requiring the lessee to do a certain amount of mining or pay a minimum royalty, and imposing the penalty of a forfeiture on failure to do one or the other. It should be observed that the contract does not authorize the lessors to forfeit the lease for refusing to pay royalty, but only for failing to prosecute mining operations for a continuous period of one year. The neglect to pay the minimum royalty was a breach of the lessee's covenant, but not a cause for forfeiting the lease. The payment of the royalty, therefore, has no bearing whatever upon the right of the lessors to declare a forfeiture of the lease. The right to forfeit the contract is wholly disconnected with the payment of the royalty, and is not affected by its payment or nonpayment. The right to exercise the forfeiture depends entirely upon another and different default by the lessee."

"The right and the authority to annul the lease were exclusively for the benefit of the lessors, and the lessee could in no way derive any advantage or be relieved from any duty imposed by the contract by the exercise of the lessor's option to nullify the lease.

Homet v. Singer, 35 Pa. Super. Ct. 491 (1908). A lease of a quarry provided: "The said lessee for herself agrees to quarry and remove from the quarry during the continuance of the lease an average of 40 carloads of salable stone per annum, said carloads not to exceed in weight the amount of 25 tons; and to pay to the said lessor, as a rent or royalty for the said quarry and privileges heretofore granted, the sum of five dollars per carload for each and every carload so quarried and sold. Said payment is to be made within thirty days after the stone are quarried, sold and delivered to the parties purchasing the same. It is further agreed and understood that should the said lessee fail or refuse to make the payments as aforesaid for the period of 30 days after the same become due and payable, or should she abandon said quarry for the space of 90 days in any working season for quarrying, or if she should let or sublet the whole or any part of the said quarry without the written consent of the lessor, or violate any of the agreements of this lease, then in either case said lessor may declare this lease null, and re-enter and take possession of said quarry without any let or hindrance and without any process of law."

The lease having fixed no place for the payment of rent, the right of re-entry cannot be enforced unless the lessor has made a demand for the

precise sum due, on the day on which it became due, on the most notorious place on the land.

A notice of forfeiture is invalid which attempts to reserve the right to recover accrued payments of rent after forfeiture. "As this lease is drawn, a forfeiture of it by the lessor, for conditions broken by the lessee, ended the lease as to both parties. If, after the notice of forfeiture was given, the lessor had collected his rent, that ground of forfeiture would fail."

Steele v. Maher, 38 Pa. Super. Ct. 183 (1909). A lease of the exclusive right and privilege of mining and developing all the coal in and underlying a certain tract of land, upon royalty, which provided that the lessee should mine a certain amount per annum and pay royalty on that amount whether the amount of coal mined in each year would amount to a royalty of that much or not; and also provided that "a failure on the part of said second party * * * to mine not less than four thousand tons in any one year or to pay unto said first parties * * * the full sum of \$400 in any one of the years of the term of this lease, * * * shall render this lease absolutely null and void." This provision did not give the lessee the right to extinguish his obligation as to future royalties by merely ceasing to mine, or to pay, and abandoning the premises and giving notice thereof to the lessors. "While parties may contract that on a default the lease may become void at the option of either party, yet such intent in the agreement must be so plain to be unavoidable in order to sustain such a construction. *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603. The rule has been established by that and many succeeding cases, that a clause in the lease that it shall be null and void on failure of the lessee to pay rent or keep other covenants is not self-operating so as to make the lease void ipso facto by the default, but being a provision for the benefit of the lessor may be enforced or waived at his option."

Tennessee.

South Penn Oil Co. v. Stone, 57 S. W. 374 (1900). An oil lease provided that if the lessee failed to commence operations to drill one well within a specified time, the lessor should have the right to forfeit the lease, unless the lessee should, upon written notice of the intention of forfeiture, elect to pay a certain annual sum for such delay. Held that the lease was not forfeited by the failure to begin the mining within the time specified, unless the lessor gave the notice prescribed in the lease, and that the mere making of a subsequent lease to a third party was not tantamount to such notice.

West Virginia.

Roberts v. Bettman, 45 W. Va. 143, 30 S. E. 95 (1898). A lease for oil and gas purposes on royalty contained this provision: "It is agreed that the party of the second part shall pay to the party of the first part \$100 per

month in advance until a well is completed from the date of this lease, and a failure to complete such well or pay such rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall, after such failure, accrue to either party on account of the breach of any covenant herein contained. * * *

It is further agreed that the party of the second part shall have the right at any time to surrender this lease * * * and thereafter be fully discharged." The lessee failed to bore a well, for a time paid rental, then defaulted therein and ultimately surrendered the lease. Held that lessor could recover the rental up to the date of surrender.

The clause of forfeiture was designed for the benefit of the lessor, not for that of the lessee. If the failure to pay the rental should release the lessee, what would be the use of the provision for payment? The clause giving the right of surrender is ample protection to the lessee (*Galey v. Kellerman*, 123 Pa. 491, 16 Atl. 474; *Wills v. Manufacturers' Nat. Gas Co.*, 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603; *Leatherman v. Oliver*, 151 Pa. 646, 25 Atl. 309; *Phillips v. Vandergrift*, 146 Pa. 357, 23 Atl. 347; *McMillan v. Philadelphia Co.*, 159 Pa. 142, 28 Atl. 220; *Conger v. National Transp. Co.*, 165 Pa. 561, 30 Atl. 1038, followed).

Snodgrass v. South Penn Oil Co., 47 W. Va. 509, 35 S. E. 820 (1900). Where a party leases a tract of land for the purpose of mining and operating for oil and gas, the lessee contracting to deliver to the credit of the lessee one-eighth of the oil produced and saved from the premises, and pay \$200 per year for the gas from each well drilled, and the lease also contains the following provision: "Provided, however, that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof, or unless the lessee shall pay at the rate of \$350 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well, until a well is completed." Held that this provision did not bind the lessee to pay any rent for the land, or for delay in commencing to operate for oil and gas, and, in the absence of some other clause binding the lessee to pay for such rent or delay, an action of assumpsit could not be maintained on such lease for failing to pay such rent or for such delay.

South Penn Oil Co. v. Edgell, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43 (1900). The forfeiture clause in a gas and oil lease, under which a valuable estate vested in the lessee, in so far as the rentals are concerned, made payable in gas, oil and money, is in the nature of a penalty to secure such rentals, against which a court of equity will grant relief when compensation for such rentals can be fully made, and great loss wholly disproportionate to the injury occasioned by the breach of the contract would otherwise result to the lessee negligently, but not fraudulently, in default.

Friend v. Mallory, 52 W. Va. 53, 43 S. E. 114 (1903). An oil and gas lease contained the provision that "this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the said premises within three months from the date hereof,

or unless the lessee shall pay at the rate of \$22.25 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease;" and the further provision that the lessee "shall have the right * * * at any time to surrender this lease to first parties for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void." Held that the lessor cannot avoid such lease, or declare a forfeiture thereof, within the time for which he has received the stipulated rental, and a lease executed to a third party within such time, intended as an act of forfeiture, is void.

Henne v. South Penn Oil Co., 52 W. Va. 192, 43 S. E. 147 (1903). The clause of forfeiture in an ordinary oil lease is for the benefit of the lessor, and no act of the lessee can terminate the lease under the forfeiture clause without the lessor's concurrence.

M. and M., by deed dated October 19, 1898, leased certain premises to M. for oil and gas purposes, which lease contained the following provision: "This lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the said premises within six months from the date hereof, or unless the lessee shall pay at the rate of \$25.50 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease." M., the lessee, assigned the lease to S. P. Oil Co., which was the lessee for oil and gas purposes of a large area of territory, including all tracts contiguous to the said premises. S. P. Oil Co. drilled a well to completion April 4, 1900, paying the stipulated rental until the well was completed, but this well was dry. It then removed its material and machinery from the premises, and proceeded to drill other wells nearer to developments already made and in the direction of the premises in question. Held that, under the lease and the circumstances of the case the S. P. Oil Co. was entitled to a reasonable time in which to return and make further developments under the lease.

After the completion of said dry well, H. prevailed on the lessors, in consideration of \$300 cash, to lease to him the same premises for oil and gas purposes, which they did, inserting, however, this clause: "It is further agreed between the parties hereto that this lease is made and this contract entered into subject to a certain other lease and contract made for the same premises by the parties of the first part to M., bearing date on October 19th, 1898, and recorded in Deed Book 108, page 875, in the county court of Harrison county, and that the existence of said former lease is made known to the party of the second part, and who is fully informed and aware of its terms and conditions." Held that the lease to H. was not a declaration by the lessors of unequivocal forfeiture of the first lease.

Core v. New York Petroleum Co., 52 W. Va. 276, 43 S. E. 128 (1903). To work a forfeiture of an oil and gas lease, there must be a breach of a condition or covenant expressed in the lease; ordinarily, a breach of an implied covenant will not work a forfeiture of the lease.

Where, in such lease, causes of forfeiture are specified, it is not to be inferred that there are other causes of forfeiture not declared in the lease to be such. The remedy for a breach of an implied covenant is ordinarily not by way of forfeiture of the lease in whole or in part, but by an action for damages caused by such breach.

Smith v. South Penn Oil Co., 59 W. Va. 204, 53 S. E. 152 (1906). An oil and gas lease on royalty contained no provision to drill or pay rent, but provided that it should become void unless a well were completed within three months, or the lessee paid quarterly a certain amount for each three months' delay until completion. Such a contract being ambiguous as to what is a completed well, the conduct of the parties in treating the completion of an unproductive well as an act sufficient to vest in the lessee a right to explore further without further payments, is conclusive upon them. The lessee having completed one unproductive well and paid rental until its completion, the lessors permitted him to drill another well without demanding further payment. None, therefore, could thereafter be recovered as rent under the lease, although the lessee could not remove the oil itself, except under the terms of the lease. (Compare *Federal Betterment Co. v. Blaes*, 75 Kan. 69, 88 Pac. 555, above.)

Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179 (1907). See this case on page 201.

Although the lease in this case contained a provision that work should begin at a fixed time, the court based its decision upon the implied covenant to begin work within a reasonable period, and held that a failure to do so worked a forfeiture.

Pheasant v. Hanna, 63 W. Va. 613, 60 S. E. 618 (1908). W. leased to H. for the purpose of mining and removing sand, lessees covenanting to pay a royalty and begin mining within one year, and diligently prosecute the same. The lease also granted an option to lease the land for 99 years, or to purchase the fee within two years, and contained the following clause: "should from any cause the work of mining sand and shipping the same cease for the period of two years at any time or fail to pay the sum of one hundred dollars annually, which is to be deducted from the first royalty due, then this lease to be null and void." Lessees did no work for four years, when they began preparations for work. In the meantime, however, they paid the rental the first two years, and tendered the same the third and fourth years, but these latter were refused by the lessor who claimed a forfeiture. Held the term of the lease had not expired. In point of time it was an indefinite lease. The option did not designate the end of the term, it merely constituted an option on the part of lessee to make a new contract. The expiration of the two years did not put an end to the term. And with lessees preparing for prosecution of the work and tendering the moneys to be applied as royalty, no forfeiture can be declared.

And this is true though tender of the money be a day late, for where the interests of no third parties have intervened, equity will relieve against a mere technical forfeiture.

Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762 (1909). Where an oil lease provides that it shall be void if a well be not completed or in lieu thereof money paid within a fixed time, and before that time expires lessor's title is found to be defective, and he agrees to forfeit it, agreeing that no money need be paid until such title is perfected, he is barred from declaring a forfeiture and making a second lease. "In case of such a lease if the lessor by his conduct clearly indicates that payments will not be demanded when due, and thus lulls the lessee into a feeling of security and throws him off his guard, and because of this he does not make payments when due, the landlord cannot suddenly, without demand or notice, declare a forfeiture, and there is no forfeiture which equity would recognize, and if there is in such case technically a forfeiture at law, equity would relieve against it."

McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595, 64 S. E. 1027 (1909). Under a lease for a fixed term "and as long thereafter as oil and gas or either of them is found by the party of the second part" the lessor has no authority to declare a forfeiture because he thinks the gas not in paying quantities, when the lessee thinks it is, and is willing to pay the amount agreed for the well. A proviso for annulment if gas be not found in paying quantities is for the benefit of the lessee. The failure to market gas after discovering the same is no ground for forfeiture if the lessee is willing to pay the amount agreed for the well. Where there is no express provision requiring additional wells, but only an implied one, failure to drill additional wells will not work a forfeiture.

Wyoming.

Phillips v. Hamilton, 17 Wyo. 41, 95 Pac. 846 (1908). By the terms of a lease of land for the purpose of extracting oil and gas on a royalty basis, the lessee agreed to commence operations within a year. He dug a well within that time and found gas, but not in commercial quantities. He then removed the rigging, did some drilling on a well on adjoining land, and four months later returned with a portable rig and cleaned out the first well, afterwards removing the rig and leaving the casing in the well. Seven months afterwards he began to dig another well upon the premises, but was stopped by notice from the lessor on the ground that he had failed to commence operations within a year. The lease contained no express covenant for diligence in operation or as to the amount of work to be done, but it was held that there was an implied covenant that the work of prospecting and development should continue after the expiration of the year with reasonable diligence. "It is evident that the purpose of the lease was to explore the premises, and if oil or gas was found therein in paying quantities, to produce and market the same for the mutual benefit of both parties. Such being the case, it was the duty of the lessee, under the implied covenant contained in the lease, to proceed with reasonable

diligence to prospect and develop the premises, having due regard to his own interest and those of the lessor. It was likewise the duty of the lessor to allow a reasonable time to the lessee to do so before he could claim a forfeiture, or right to cancel the lease, if he had any such right under the terms of the contract."

"It is at least doubtful if a breach of such an implied covenant would warrant the court in decreeing a forfeiture when the lease does not expressly so provide, and when it does provide that the lease may be forfeited in whole or in part for another cause therein specifically stated." This is not decided, since the evidence does not show facts which would establish a failure to diligently prospect and develop.

Not only was there no forfeiture, but likewise there was no abandonment, which is the relinquishment of rights or property by one person to another, there being no intention to abandon shown. The facts on the contrary show that such was not the lessee's intention.

E. By Abandonment and Surrender.

p. 170. To the classes of cases, enumerated in volume one, in which leases or estates may be terminated by abandonment, must be added the abandonment which results from the breach of the implied obligation of the lessee to mine or to explore and develop the land. As has been seen above (see page 202), there is a tendency in Indiana and California, where such an implied obligation exists, to treat its breach as a ground of forfeiture. Elsewhere, however, the failure to perform this implied covenant is held to amount to an abandonment and consequently to terminate the lessee's estate. The question has generally arisen in connection with oil and gas leases. Abandonment being a question of fact, its determination belongs to the jury and is to be reached by a consideration of the fact of the cessation of work and of the lessee's explanation thereof. If that cessation is unexplained and has lasted for an unreasonable time, a presumption of abandonment arises, and the court may find as a matter of law that the lease is terminated.

Where, however, there is an express undertaking to do specified development work, the lessee may not bring about a termination of his lease by abandonment so long as the specified work has not been completed.

United States.

Elk Fork Oil & Gas Co. v. Jennings, 84 Fed. 839 (1898). C. C. D. W. Va. The owner of lands granted, demised and let unto the lessee, his heirs and assigns, for the purpose and with the exclusive right of drilling and operating for petroleum and gas, a certain described tract, to have and to hold for the said purposes only for and during the term of ten years and as much longer as oil or gas is found in paying quantities. The consideration was one-eighth of the oil produced and a fixed annual sum for every gas well drilled. Lessee was given the usual water and transportation rights and agreed to pay any damage done to growing crops by the laying of pipes, the operations to be conducted so as to interfere the least with farming privileges. He further agreed to complete one well within one year, unavoidable accident excepted, and in case of failure to do so to pay for delay a certain sum per annum and upon failure to complete the well or make such payments the lease was to become null and void.

It was found to be a fact that a well had been completed and, consequently, no forfeiture was worked. It was in addition held that the contention of the lessees that by virtue of the completion of the test well their title to the lease became vested for the granted term of ten years and as much longer as oil or gas should be found in paying quantities, without obligation on their part to operate further, was not well founded. It was the intention of the parties that the royalty should be paid and the necessary search made within a reasonable time after the execution of the lease, and that the lessee was to have a period of ten years in which to remove the oil and gas from the land with the understanding that if at the expiration of that time such products should still be found in paying quantities the term should be extended until they were removed. A failure for some five or ten years after the completion of the well to pursue the search for oil or gas amounted to an abandonment of the lease and a lease made by the owner of the land to other parties was valid.

Paine v. Griffiths, 30 C. C. A. 182, 86 Fed. 452 (1898). 3rd Circ. A grant of minerals contained a provision that the grantee should search for coal, iron and other minerals, etc., "and the party of the second part shall have the right to abandon said lands and mining at any time and remove all his buildings and fixtures from said lands." An abandonment by the grantees terminated not only their right to operate but all rights conferred by the contract.

"It is probable the court would have been justified in saying that if the jury should find that the grantees and their assigns did substantially nothing under the agreement, for the period which elapsed between its date and the subsequent lease to Griffiths, more than 20 years, it should find an abandonment. While the question is one of intention mainly, its decision does not depend upon an intention to abandon or retain the mineral right alone, divorced from the obligations which adhere to it under the contract, but intention to abandon the contemplated enterprise.

Evidence therefore of transfer, or attempts to transfer this right, as matter of mere speculation, was entitled to no weight in the presence of proof that nothing further was done or intended to be done; and that the obligations on which the grant rests were disregarded and abandoned." Nor is the question affected by the fact that the subsequent lessee undertook to clear the cloud from his title by an attempt to buy the title under the grant.

Atchison v. McCulloch, 5 Watts, 13, was quoted with approval as follows: "Abandonment is not always a question of intention exclusively for the jury, without a controlling instruction from the court. Under a certain uncontradicted state of facts the law will pronounce the conduct of a party to be an abandonment, whatever may have been his intention."

Foster v. Elk Fork Oil & Gas Co., 32 C. C. A. 560, 90 Fed. 178 (1898). 4th Circ. An oil and gas lease for ten years, or as long as oil or gas is found in paying quantities, contained a covenant to complete a well within one year with penalty for failure. The consideration was to be one-eighth of the oil and \$100 per annum for each gas well.

The covenants in the lease contemplate active operation. They are not fulfilled by digging one well; that is but the beginning of operations which is insured by the penalty. Having dug one well which was dry, the lessee did nothing further for eight years. This was an abandonment.

Woodside v. Cicceroni, 35 C. C. A. 177, 93 Fed. 1 (1899). 9th Circ. See this case on page 56.

Federal Oil Co. v. Western Oil Co., 57 C. C. A. 428, 121 Fed. 674 (1903). 7th Circ. See this case on page 77.

California.

Payne v. Neuval, 155 Cal. 46, 99 Pac. 476 (1909). By the terms of an instrument granting in consideration of a royalty mineral rights which were determined to be "in the nature of an incorporeal hereditament," it was provided that the grantee might relinquish his rights on thirty days' notice. He quarried and removed a little rock, and then removed his machinery, and did nothing further up to the time of his death fifteen years later, except that he paid the minimum royalty for two years. His rights under the grant were extinguished by abandonment. His failure to notify the lessor was immaterial. The lessor might waive that requirement.

Connecticut.

New Haven v. Hotchkiss, 77 Conn. 168, 58 Atl. 753 (1904). Where an incorporeal right to open and work a mine is reserved, and the grantor opens the mine, but fails to work it for eight years, such failure does not constitute an abandonment of the right. "Whether the right was so abandoned was mainly a question of fact. The deed did not require a continuous working of the mine until it should be exhausted. Upon the facts showing the reason of such failure to work the mine, we cannot

say that as a matter of law it worked an abandonment." The facts were that it was necessary to test the mineral (paint) before a market could be found for it and that it was so tested during the period of eight years referred to. See this case also on page 57.

Illinois.

Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46 (1908). A provision in an oil and gas lease, giving the lessee the option to surrender at any time upon the payment of one dollar, is an option to the lessee only, not to the lessor to compel a surrender. Such an option is not invalid and does not reduce the lease to a tenancy at will.

Indiana.

Woodward v. Mitchell, 140 Ind. 406, 39 N. E. 437 (1895). M. leased to W. "for the sole purpose of mining and removing coal, stone, gas, water, oil, minerals and metals of every kind thereunder," a tract of land for 20 years, "provided if said enterprise shall be abandoned 12 months, then said lease shall be null and void." The failure to commence operations and to do anything under the lease for 12 months was an abandonment of the enterprise within the above proviso, and the lessors had the right to have the apparent encumbrance on their title judicially declared void in an action to quiet title. The fact that the lessees could not work the land for want of railroad facilities, and had taken leases of other lands in the neighborhood which they were working so as to approach this tract as fast as they could, constituted no excuse for failure to work it.

Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196 (1896). See this case on page 187.

Bettman v. Shadle, 22 Ind. App. 542, 53 N. E. 662 (1899). Lessee in an oil and gas lease covenanted to commence a well within one month, or to pay \$2 per day until commenced, or surrender the lease. It was also provided that lessee should have the right to surrender at any time "and be released from all moneys due and conditions unfulfilled then, and from that time this lease shall be null and void and no longer binding on either party, and the payments which shall have been made be held by the party of the first part as stipulated damages for the nonfulfillment of the foregoing contract." Held that the surrender of the lease did not have the effect of canceling the indebtedness of the lessee already accrued thereunder, by reason of his failure to commence a well.

Ramage v. Wilson, 88 N. E. 862 (1909). An oil and gas lease of twenty acres provided that if no well were completed within fifteen months the lease should be void unless lessee paid one dollar per day for each day's delay; that lessee should drill an additional well each sixty days or pay one dollar per day for each day's delay until three wells were completed; and gave to the lessee the right at any time to cancel the lease or any part thereof. He drilled two wells on the eastern thirteen and one-third acres,

but none on the remaining six and two-third acres, as to which he attempted to avoid the obligation to drill or pay rental by canceling the lease as to these six and two-third acres. Held this could not be done. He could have annulled the entire contract at any time, surrendered possession of the property and relieved himself of all further liability, but having retained possession of two-thirds, he was not relieved from the obligation to drill a third well or pay. "It is not reasonable to presume that the parties intended thereby that the grant of all the oil and gas under said premises should remain in effect, and yet the lessee be permitted to alter the positive agreement to drill three wells in order to develop the land."

Upon the discovery of oil the lessee's interest became thereby a vested interest in the leased premises.

Iowa.

Worrall v. Wilson, 101 Iowa, 475, 70 N. W. 619 (1897). A lease granted the right to mine coal under a tract of land for 10 years. The assignee of this lease ceased work and said that he would do nothing more under the lease. He completely dismantled the mine, removed all the apparatus and tore out the timbers, leaving the mine in such condition that it would soon become valueless by reason of caving in. Three months later he again entered the premises and undertook to sink a new shaft. He was enjoined from doing so, it being held that he had abandoned the premises and that a surrender of the lease had resulted.

Hosford v. Metcalf, 113 Iowa, 240, 84 N. W. 1054 (1901). Where no time is given within which a privilege to mine may be exercised, it continues for a reasonable time, and what would be a reasonable time must be determined by the circumstances. The mere failure to exercise the privilege during a time when there was not sufficient demand for the mineral to justify it, more or less work, however, being done from time to time on the mine, does not constitute an abandonment and therefore a termination of the privilege. See this case also on page 60.

Price v. Black, 126 Iowa, 304, 101 N. W. 1056 (1905). Where there is an implied obligation on the lessee to use reasonable diligence in the operation of the mine, and the lessee works the mine in a desultory way for about six years, but the lessor makes no complaint and accepts the royalties under the lease, and the delay in working the mine was due largely to difficulties encountered therein, and the lessee, with the knowledge and consent of the lessor, expended large sums of money in seeking to operate the mine, no abandonment by the lessee will be inferred. Lapse of time is evidence of abandonment, but it is not conclusive. Act and intent must concur, before a court is justified in finding a forfeiture through abandonment.

Kansas.

Rawlings v. Armel, 70 Kan. 778, 79 Pac. 683 (1905). Whenever an abandonment of land leased for oil and gas purposes in fact occurs, the lease is subject to cancellation; and a subsequent tender of overdue rent will not restore the lessee's rights, against the will of the lessor. The question of abandonment is one of fact, depending upon intention and conduct. See this case also on page 82.

Mills v. Hartz, 77 Kan. 218, 94 Pac. 142 (1908). See this case on pages 83 and 123.

Kentucky.

Ward v. Tripple State Natural Gas & Oil Co., 115 S. W. 819 (1909). A gas lease for thirty years gave lessee the right to take sixty days for payment of rentals after the same became due; it also authorized lessee to surrender the lease at the end of five years. At the end of the fifth year lessee gave due notice of his intention to surrender, but took ten days over the sixty to pay the moneys then due. In view of due notice to lessor the taking the extra time was not a holding over which would invalidate the surrender. His permitting the pipe lines to remain under the ground did not affect his right to surrender the lease if his use of the pipe lines was abandoned, and their presence did not interfere with lessor's use of the premises. If he continued to use them in spite of his notice of surrender, there was no surrender.

Michigan.

Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468 (1903). Where an instrument gives to a company the right to mine iron ore under a lease in certain premises, such right being conveyed as appurtenant to a furnace then owned by the company, the abandonment and destruction of the furnace destroys the appurtenant right to mine the ore under the lease.

"There is certainly force in the claim that a personal, unassignable, and incorporeal right to take ore appurtenant to a furnace is abandoned by the failure to exercise that right for 43 years; especially where the right was once exercised and abandoned. Whatever may be the rule as between the lessor and the lessee where neither has taken any steps to exercise the right to mine, as between such lessee and subsequent lessees and grantees of the lessor, who have in good faith expended large sums in developing mines, the lessee is estopped to assert his personal and incorporeal right." See this case also on page 58.

New York.

Millie Iron Min. Co. v. Thalmann, 34 App. Div. 281, 54 N. Y. Supp. 276 (1898). The plaintiffs leased to the defendants an iron mine, the de-

defendants covenanting to pay a certain royalty on the ore mined, and a minimum royalty whether any ore was mined or not. The defendants did not take possession of the mine and did not demand possession thereof, and the plaintiff remained in possession and mined ore. At the end of two years the plaintiff brought suit to recover the royalty agreed upon. Held that it is the duty of the lessee to demand possession at the premises. The defendants claimed that the plaintiff having remained in possession of and operated the mine, there was a surrender of the lease by operation of law, and an acceptance of such surrender. But "the plaintiff was not required to abandon its mine, and leave it vacant and uncared for. It had a right to use it until requested to give possession in pursuance of the contract of lease, and no such demand having been made, it was entitled to remain in possession of, to care for, and to use its property." The plaintiff was therefore entitled to recover.

Wagner v. Mallory, 41 App. Div. 126, 58 N. Y. Supp. 526 (1899). Where, under an oil lease, in which the lessor reserves a royalty on the oil produced, no attempt is made to experiment for oil for nearly 20 years, this protracted quiescent attitude of the lessees "may well be considered to be an abandonment of the grant, as its only purpose was for the production of petroleum."

Conkling v. Krandusky, 127 App. Div. 761, 112 N. Y. Supp. 13 (1908). An oil lease executed in 1893 for fifteen years, or so long as oil is found in paying quantities, and which provided that unless the lessee commenced drilling within three months the lease should be null and void, was held to vest no estate in the lessee until oil had been found. The lessee commenced drilling within three months, but found no oil, and in 1894 took away his derrick and machinery, leaving only the casing, and did nothing further for eleven years. He then entered, put down a well and found oil, but in the meantime the lessor's widow had executed a new lease to a third party. While ordinarily forfeiture and abandonment are not looked upon with favor, this rule is not applicable to oil leases. The act of the lessee in taking away his machinery indicated an abandonment, and this was emphasized by the fact that he did not again resume work for eleven years. The lease made by lessor's widow was a declaration on her part that she regarded the outstanding lease as terminated.

Ohio.

Welty v. Wise, 5 Ohio Cir. Ct. R. 50 (1897). W. leased land to H. with the right to mine thereon, paying a royalty on the coal, and if coal was mined "this lease to be good as long as there remains coal unmined." Lessee worked the mine for nine years and then did nothing for eleven years. It was held that it was in the contemplation of the parties that the mine should be worked, and that the lessee's failure to work it for the length of time shown amounted to an abandonment, and on application of the lessor's administrator it was ordered that

the land be sold for the payment of his debts clear of the encumbrance of the lease.

Tucker v. Watts, 25 Ohio Cir. Ct. R. 320 (1903). Where a lessee is given the privilege to drill for oil and gas upon which, when found, a royalty is to be paid to the lessor, and no definite term is fixed in the lease for its duration, the lessee must explore the land and drill wells within a reasonable time and with reasonable diligence. He has no right, when oil is found in considerable quantities, to decline to produce the oil for the benefit of the lessor because, in the condition of the oil market, it would not be profitable for the lessee to do the drilling. To fail so to explore the land amounts to an abandonment thereof and terminates the lease. Where, therefore, under such a lease, the lessee, after completing one well and finding nothing therein, removes all the drilling appliances from the land, and drills no wells thereafter during a period of six years, announcing his intention to wait for an advance in the market price of oil, this amounts to such an abandonment of the lease.

Pennsylvania.

Stage v. Boyer, 183 Pa. 560, 38 Atl. 1035 (1898). By the terms of a lease of land for oil purposes for ten years and as long thereafter as oil and gas be found in paying quantities, it was provided that the lessee might abandon the premises at any time, but that an abandonment should not deprive him of the right to convey oil and gas over the land from other lands. Lessee drilled a well which was unproductive. He then notified the lessor of his intention to abandon the well, assigning as a reason that it was of no value, and drew the casing and removed the machinery. He made no further search on this land, but did conduct operations on other lands in the vicinity. Five years later the lessor asked him to surrender the lease, but he declined to do so, saying that he intended to keep it. This was sufficient to sustain a finding that the lease had been abandoned.

Cole v. Taylor, 8 Pa. Super. Ct. 19 (1898). A lessee of land for the term of two years "and so long thereafter as oil or gas can be produced in paying quantities" for a time ceased to operate and abandoned the premises because he could no longer obtain oil in paying quantities. Held, lessee had terminated his lease by abandonment and had no title which he could confer on an assignee.

Ahrns v. Chartiers Valley Gas Co., 188 Pa. 249, 41 Atl. 739 (1898). Plaintiff in 1885 leased to defendant for the purpose of drilling for oil or gas for the term of ten years. Lessee agreed to drill two wells; No. 1 within one year, No. 2 within two years. Upon the completion of a well and if a sufficient quantity of gas was obtained to utilize, a certain annual rental was to be paid. The same rental was to be paid as compensation for delay. Failure to make payments within 30 days after they fell due was to render the lease null and void. Lessee completed one well and obtained gas and paid rental for two years. The well was then plugged. The

second well was never dug. This action was brought in 1897 for rent. The lessee set up an abandonment. Held it had no right to abandon, having expressly contracted to drill two wells or pay the rental provided for.

Douthett v. Gibson, 11 Pa. Super. Ct. 543 (1899). In a lease for the purpose of operating for oil and gas on royalty, the lessee agreed to commence operations within 30 days or in lieu thereof to pay \$20 per month until work was commenced. It was also provided that the lessee should "have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled." Lessee did not operate, and demand having been made on him for the amount due for delay, he neither paid nor offered to surrender the lease. Lessor then brought this suit and lessee subsequently surrendered the lease. Held, plaintiff might recover. "Assuming as we fairly may that the agreement under consideration amounts in legal effect to a mere option, it must not be so construed as to extend the elective right thereunder beyond what is reasonable and fair. There was a time when the defendant was bound to exercise his right of election under the option. That time came to him when the plaintiff made the demand for the accrued rentals under the agreement. * * * He should have exercised his right of election at that time and surrendered the lease. * * * Under the circumstances the defendant fixed his liability under the agreement at the time of the demand of the plaintiff for the amount due under the agreement."

Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696 (1899). A lease which gave the exclusive right of operating for oil and gas on royalty provided that lessee should drill a well in the vicinity within six months, and if oil should be found in paying quantities, then lessee should complete a well on demised premises within a fixed time or pay a fixed rental for delay. A failure to complete this well or to make such payment was to avoid the lease. The test well did not produce oil and after five years lessor leased to other parties. This was ejectment by first lessee against second lessee.

Mitchell, J.: "The rule in regard to contracts is that where the parties have expressly agreed on what shall be done there is no room for the implication of anything not so stipulated for, and this rule is equally applicable to oil and gas leases as to other contracts. There is nothing peculiar about them in this respect. But here the parties have provided for a test well, and for what shall be done if it produces oil in paying quantities. But the other contingency, that it prove dry, is not provided for, and it is the omitted case that has occurred. The authorities are uniform that under such circumstances there is an implied obligation on the lessee to proceed with the exploration and development of the land, with reasonable diligence according to the usual course of the business, and a failure to do so amounts to an abandonment which will sustain a re-entry by the lessor.

"Abandonment is a question of fact to be determined by the act and intentions of the parties. An unexplained cessation of operations for the period involved in this case gives rise to a fair presumption of abandon-

ment, and standing alone and admitted would justify the court in declaring an abandonment as matter of law. But it may be capable of explanation and is therefore usually a question for the jury on the evidence of the acts and declarations of the parties."

Calhoon v. Neely, 201 Pa. 97, 50 Atl. 967 (1902). M. leased to P. a tract of land for the purpose and with the exclusive right of drilling and operating for oil for the term of fifteen years and as much longer as oil and gas were found in paying quantities. The lessee drilled a test well but obtained no oil. He then removed his machinery, and did nothing and asserted no title for nine years. This case is governed by *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732 (vol. 1, p. 174). "The suspension of operations, abandonment of the search for oil and gas, and relinquishment of the premises for nine years, were an unqualified surrender by the appellant of whatever rights they had to perfect their inchoate title. It was their announcement to the lessor that they were done and that he could give exploring privileges to others."

The lease contained a provision that operations should be begun within 30 days and prosecuted with diligence "and no right of action shall after such failure accrue to either party on account of the breach of any covenant." This provision had no application to the question of abandonment. No question of forfeiture of any right of action claimed by the lessor is involved here.

Wilson v. Philadelphia Co., 210 Pa. 484, 60 Atl. 149 (1904). See this case on page 200.

Arnold v. Cramer, 41 Pa. Super. Ct. 8 (1909). The doctrine of abandonment does not apply under an instrument which passes title to the minerals in place. Abandonment only takes place in case of imperfect title. "Abandonment as to a perfect title could only be affirmed on a state of facts sufficient to raise an estoppel or where possession has been acquired and held under a claim of title by limitation."

"Abandonment is ordinarily a question of intention. There must be an intention to abandon as well as an actual abandonment of property, and where the character of the transaction depends on the intent of the party it is competent for him to testify what his intention was."

Texas.

Emery v. League, 31 Tex. Civ. App. 474, 72 S. W. 603 (1903). A lease of an interest in land for the purpose of prospecting for oil and minerals had been held not to be an absolute conveyance, but in the nature of an option which might ripen into a title only upon compliance with the terms of the agreement. (See page 86, above). "The grantee under such an instrument, so long as he continued diligently to comply with his agreement to prospect and explore the land for minerals, could not be deprived of his right to acquire title to such minerals by their discovery and development, but no title in such minerals would vest until their discovery, and unless such grantee begins the performance of his part of the

contract within a reasonable time the grantor can consider the contract abandoned."

West Virginia.

Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220 (1897). Plaintiff leased to defendant "for the sole and only purpose of drilling and operating for oil and gas" a tract of land for twenty years, or as long as oil or gas is found in paying quantities for a royalty on the oil produced and a fixed rental for each gas well. Lessee covenanted to commence one well on or before May 10, 1889, and prosecute it to completion. By agreement endorsed on the lease this time was extended to Nov. 25, 1889. Lessee did nothing under the lease for seven years. He was presumed to have abandoned the lease, and a court of equity will entertain a suit to cancel the same and quiet title.

McWhorter, J.: "A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. A lease of a right to mine for oil etc., stands on a different ground. The title is inchoate and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract."

Parish Fork Oil Co. v. Bridgewater Gas Co., 51 W. Va. 583, 42 S. E. 655, 59 L. R. A. 566 (1902). The law recognizes a distinction between the abandonment of operations under an oil lease and an intention to abandon or surrender the lease itself. Unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others.

Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027 (1903). To constitute abandonment by the lessee of a lease for oil purposes, there must be both an intention to abandon and an actual relinquishment of the leased premises. An abandonment was found where the lessee after drilling two wells, one of which produced oil, but not in large quantities, discontinued work, removed the machinery and did nothing for a year and gave plain sign of no intent to go on. See this case also on page 92.

Sult v. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307 (1908). Whether a lease has been terminated by abandonment on the part of the lessee and the acceptance of, or re-entry upon, the premises by lessor, are questions of intention.

CHAPTER V.

PROPERTY OF THE SOVEREIGN AND ITS GRANTEES IN MINERALS.

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| <ul style="list-style-type: none">I. In Mines of the Precious Metals.II. In Minerals in the Beds of Navigable Streams.III. In Minerals Under Public Highways.IV. In Minerals Contained in Lands Taken by Right of Eminent Domain. | <ul style="list-style-type: none">A. Property in the Minerals Upon or Under the Lands Appropriated.B. Mine Owner's Rights, and Restrictions Upon Him by Reason of the Exercise of the Dominant Right. Damages for the Taking. |
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I. IN MINES OF THE PRECIOUS METALS.

p. 178.

II. IN MINERALS IN THE BEDS OF NAVIGABLE STREAMS.

p. 179. For the system by which the right may be obtained to mine phosphate rock from the beds of navigable streams in North Carolina, see Revisal of 1905, §§ 1751-7, Acts of 1891, c. 476.

Pennsylvania.

Hunt v. Graham, 15 Pa. Super. Ct. 42 (1900). The public has the right to gather stones, gravel, and sand out of the beds of public rivers. The soil and water between the lines that describe low-water mark are maintained as eminent domain for the use of all citizens.

III. IN MINERALS UNDER PUBLIC HIGHWAYS.

p. 183.

Colorado.

City of Leadville v. Bohn Min. Co., 37 Colo. 248, 86 Pac. 1038, 8 L. R. A. (N. S.) 423, 11 A. & E. Ann. Cas. 443 (1906). The predecessor in title of the defendant dedicated streets over its property. The state statute

(General Laws 1877, § 2647) provided that streets should be deemed public property, and the fee thereof vested in the city or town. "The legislature used the term 'fee' not according to its technical legal meaning, but as vesting in the city a complete perpetual and continuous title to the space designated as streets so long as it used them for the purpose intended." "It seems clear to us, therefore, that the intent and purpose of our statute is to clothe the city in its governmental capacity, with the entire title to the streets as such for public use, and not for the profit or emolument of the city. It was plainly the intention of the dedicator to part with the title to so much of its property only as was necessary to effectuate the purpose of establishing certain streets and alleys, designated and described upon the plat, for public use, and to clothe the city with the absolute title thereto for that purpose only, and not to vest it with any estate or interest in the ores that may exist thereunder." The court refused to enjoin the defendant from mining beneath the surface of the streets when their operations in no way interfered with the use of the streets as highways by the public, or for municipal purposes by the plaintiff.

Kentucky.

Hamby v. Dawson Springs, 126 Ky. 451, 31 Ky. Law Rep. 814, 104 S. W. 259 (1907). The right to minerals under the surface does not pass to a town by the dedication of a street. The owner of the abutting property remains the owner of the fee in the streets, and retains whatever mineral rights there may be under the same.

IV. IN MINERALS CONTAINED IN LANDS TAKEN BY RIGHT OF EMINENT DOMAIN.

A. Property in the Minerals Upon or Under the Lands Appropriated.

p. 186. In Michigan it is provided by the Street Railways Act that the taking of a right of way by right of eminent domain does not carry with it any right, title or interest in the minerals upon or beneath the surface. They remain the property of the owner of the land at the time the right of way was acquired (Act of May 18, 1905, p. 183).

Indiana.

Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020 (1903). The lessee of a tract of land for oil and gas purposes, over which a railroad company has an easement or right of way, has such a proprietorship of the tract that he may enjoin the drilling of a gas well on the land covered by the easement.

Pennsylvania.

Rice v. Clear Spring Coal Co., 186 Pa. 49, 40 Atl. 149 (1898). The grantee of land bordering on a highway (railroad) is entitled to the minerals underlying the highway to the middle thereof.

Robinson v. Pennsylvania R. Co., 6 Pa. Super. Ct. 383 (1898). See this case as to material taken for construction of a railroad under statutes incorporating the Pennsylvania Railroad Company.

Hendler v. Lehigh Val. R. Co., 209 Pa. 256, 58 Atl. 486, 103 Am. St. Rep. 1095 (1904). "By the Railroad Act of February 19, 1849, sec. 10, P. L. 79, the railroad company is authorized to enter upon lands surveyed and located for its right of way and thereon 'to dig, excavate and embank, make, lay down and construct' the road. The use of the materials so dug, excavated, etc., is necessarily implied in the authority to construct, and compensation for them is included in the assessment of compensation or damages for the land taken. This is made still more plain by the further provision in the same section that 'it shall in like manner be lawful * * to enter upon any lands adjoining or in the neighborhood of their railroad so to be constructed and to quarry, dig, cut, take and carry away therefrom, any stone, gravel, clay, sand, earth, wood or other suitable material, necessary or proper for the construction of any bridges, viaducts or other buildings which may be required for the use, maintenance or repair of said railroad,' with proviso that compensation shall be made for such materials and an exceptional proviso as to timber that it shall be obtained from the owner only by agreement or purchase.

"When therefore a railroad company obtains a right of way, either by condemnation, or as in this case by an equivalent agreement, it has the right to use without further compensation all the suitable materials, except timber, within the lines of its way, for the construction of its road through the property of the landowner. Whether such materials are above or below the grade of the road makes no difference. The language of the act is not limited by any such considerations. If it is necessary to go outside the lines of their way for sufficient width to support an embankment they may do so but must pay for the additional land occupied, and so if it is necessary to go outside the lines to give the walls of a cut the slope required to prevent sliding or washing down, they may do so on paying for the additional materials taken outside. But within the lines the materials are part of the land taken, and compensation for it includes the whole.

"The right, however, extends no further as against each owner than the boundaries of his own land. His land has been subjected to a servitude for the construction and maintenance of a railroad through it, but not for construction or maintenance through any other land. For the use of his land or materials for the latter purpose he has not been compensated, and if they are taken for that purpose, it must be under the clause of the act as to adjoining or neighboring land already quoted, and upon additional compensation."

B. Mine Owner's Rights, and Restrictions Upon Him by Reason of the Exercise of the Dominant Right. Damages for the Taking.

p. 187.

Montana.

Northern Pac. & M. R. Co. v. Forbis, 15 Mont. 452, 39 Pac. 571, 48 Am. St. Rep. 692 (1895). In an action for condemnation of land for railroad purposes, it is error to confine the landowner to proof of value of his land either as a mining claim or as a town lot and to require him to elect which value he would prove.

In *Montana R. Co. v. Warren*, 6 Mont. 275, 12 Pac. 641, evidence of the value of the ground for both purposes was admitted and the jury was instructed that the landowner could not recover for two uses or purposes. By this was meant two incompatible uses. Whether the different uses to which the land could be put are incompatible is for the jury. "The evidence being introduced, the court should by appropriate instructions, as in the *Warren* case, have properly limited the consideration of this evidence by the jury. The jury could then, under these proper instructions, have determined whether the town lot use would destroy the owner's use of the surface of the ground for mining purposes to the same extent as would the railway use. It must be remembered throughout this whole consideration, however, that the railway company condemns and takes only the easement of the use of the surface of the ground, and does not take the owner's estate in the minerals, or the right to work the ground for the minerals if he can do so by not interfering with the railway's estate in the easement. * * * It is perhaps difficult to understand how the surface of the ground could be used for mining purposes if the easement of the right of way to the railway company had been granted, any better than such surface could be used for mining purposes if an easement for town lot uses had been granted, but we cannot hold otherwise than that this matter is a question of fact" for the jury.

Pennsylvania.

Robinson v. Pennsylvania R. Co., 6 Pa. Super. Ct. 383 (1898). See this case as to damages for material taken for use in the construction of a railroad under statutes incorporating the Pennsylvania Railroad Company.

Lehigh Coal Co. v. Wilkesbarre & Eastern R. Co., 187 Pa. 145, 41 Atl. 37 (1898). Where a railroad company takes a part of culm bank by right of eminent domain, the owner may recover the value of the coal in the bank. It is personalty and its value is the fair value of what the owner could have realized in the market less the cost of getting it there. "In estimating these matters, the advantage of getting a present lump sum, instead of instalments from time to time by sales of the coal and also the just allowance

to be made for wear and tear of machinery, interest on capital invested, etc., are proper subjects for consideration."

Morris & Essex Mutual Coal Co. v. Delaware L. & W. R. Co., 190 Pa. 448, 42 Atl. 883 (1899). Where culm has been taken under right of eminent domain for ballasting, filling etc., the owner can recover no damages in the absence of proof of actual loss.

Kossler v. Pittsburg, etc., R. Co., 208 Pa. 50, 57 Atl. 66 (1904). In a proceeding against a railroad company to assess damages for the taking of a lot of ground under the right of eminent domain, the value of a salt water well upon the premises is one of the elements of value of the property. But the market value of such a well is not to be determined by evidence of the profits which may be made by treating the product of the well in a manufacturing plant operated with successful business skill. The market value of the well is merely its selling value as such.

"Whether or not this product, as such, had any market value, does not appear from the evidence. No use had been made of it for a period of some nine years, and there was nothing to show what its value was, except in connection with the erection of an evaporating plant, and its operation subject to the contingencies of business. It is suggested in the argument of appellee, that the proof of the value of the salt water well in this case is to be likened to that of an oil well. Be it so: The market value of an oil well is not determined by evidence of the profits which can be made from the product of the well, by means of a refinery erected upon the spot, and operated with successful business skill. Its market value is its selling value as a well. In the present case, the market value of the salt water well, if it were shown to have had any, at the time of the taking, would be one of the elements entering into the value of the property as a whole. If the well was destroyed, its value would also be one of the elements of depreciation, to be considered in ascertaining the loss in the selling value of the whole property caused by the entry of the defendant company."

Cole v. Ellwood Power Co., 216 Pa. 283, 65 Atl. 678 (1907). Where mineral in place is taken by right of eminent domain, the measure of damages is not the same as in trespass against one who has entered without authority of law. "The appellant here had the legal right, conferred by statute, to go upon the property of appellee and to appropriate the same to its own use. The rule as to the proper measure of damages in this case is found in *Searle v. Railroad Co.*, 33 Pa. 57; *Reading & P. Co. v. Balthaser*, 119 Pa. 472, 13 Atl. 294; *Fulmer's Appeal*, 128 Pa. 24, 18 Atl. 493, and many other like cases. The rule of these cases has never been departed from except where there had been actual severance of the coal, or ore, or stone, or other thing, the value of which was the basis of the proceedings. The proper measure of damages in this case is the actual value of the stone in place, not the prospective and speculative value of that stone when cut and sold in the market. The appellant under the law had the right to appropriate the rocks and boulders and should pay appellee for his interest in the stone in place what that interest was worth

at the time the appropriation was made." So far as stone which was severed from the land was concerned, the measure of damages was its value at the place where it was appropriated. See this case also on page 63, above.

Dotts v. Plumville Railroad Co., 222 Pa. 516, 71 Atl. 1072 (1909). "In condemnation proceedings, a railroad company in the exercise of its right of eminent domain secures not only the surface of the land but also so much of the underlying minerals as may be necessary to support the surface. The company's entry upon the land is an appropriation of the subjacent strata of coal or other minerals so far as necessary to support the surface for any purpose to which it may be put for railroad uses. * * *

"In the case in hand, the owner of the surface had, prior to the appropriation of the land, conveyed the coal underlying the surface with sufficient mining rights to enable the grantee to remove all the coal regardless of its effect upon the surface. If any part of the coal was necessary for the support of the surface, occupied by the appellant company, the owner of the coal is entitled to compensation. When, therefore, the company entered and appropriated the land for its right of way, it was required to compensate both the owner of the surface and the owner of the coal for the damages resulting from the appropriation. The owner of each is entitled to damages to the extent of his holdings, and it is apparent that the amount of damages to which the owner of the surface is entitled will depend upon the interest she has in the land. * * * It therefore follows that a witness in testifying to the amount of damages due the owner of the coal or the owner of the surface must be acquainted with the title of the party seeking to recover damages. In testifying in the action brought by the owner of the surface, he should be informed that the ownership of the coal and mining rights is in another, and that fact should be taken into consideration by the witness if the appellant's appropriation imposed any servitude on the coal."

CHAPTER VI.

THE GOVERNMENT'S TITLE AND THE GRANT THEREOF.

I. What Land is Open to Location as Mineral Land.	States the Essential Requisite.
II. Who May Locate a Mining Claim.	B. Other Qualifications of Locators.
A. Citizenship of the United	C. Location by Agent or Partner.

p. 194. For the disposition by the states of the title to their mineral lands, see in addition to references in Vol. 1, p. 194, n. 2, *Colorado Fuel & Iron Co. v. Adams*, 14 Colo. App. 84, 60 Pac. 367; Minn. Rev. Laws 1905, §§ 2483-2495, Act of April 25, 1907, c. 411, p. 587; *State v. Evans*, 99 Minn. 220, 108 N. W. 825, 9 A. & Ann. Cas. 520, page 53, above; Nevada Comp. Laws, §§ 281-282, Laws of 1907, c. 65, p. 140; *Colquitt-Tigner Min. Co. v. Rogan*, 95 Tex. 452, 68 S. W. 154; *Heil v. Martin*, 70 S. W. 430; Washington Act May 17, 1897, p. 293, c. 102, Act March 18, 1901, p. 313, c. 151, *State v. Ross*, 104 Pac. 216.

By the acts of Congress of May 17, 1884, c. 53, 23 Stat. 24 (*Bennett v. Hardrader*, 158 U. S. 441, 39 Law. Ed. 1046; *Meydenbauer v. Stevens*, 78 Fed. 787), and June 6, 1900, 31 Stat. 321, the laws relating to mining claims, mineral locations and rights incident thereto, are extended to Alaska (30 L. D. 142). By the 26th section of the latter act, all citizens and those who have declared their intention to become such are given the right to dredge and mine for the precious metals below low tide on the shores, bays and inlets of Behring Sea, subject to such rules and regulations as the secretary of war may prescribe for the preservation of order and the protection of commerce. That officer is, however, forbidden to grant any exclusive permit to engage in such mining, or to deprive the miners on the beach of the right to dump

tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation.

By the act of Congress of June 4, 1897, c. 2, as amended in 1901, it is provided that "any mineral lands in any forest reservation which have been or which may be shown to be such and subject to entry under the existing mining laws of the United States, and the rules and regulations applying thereto, shall continue to be subject to such location and entry." It is expressly enacted that it is not the purpose of the act providing for forest reservations to authorize the inclusion therein of lands more valuable for the mineral therein than for forest purposes. Lands which have been so included, and subsequently found better adapted for mining purposes than for forest usage, may be restored to the public domain by the secretary of the interior in the manner prescribed in the statute (24 L. D. 589, 30 L. D. 28, 35 L. D. 267. See also page 252, below).

Although by the act of Congress of March 3, 1891, c. 543, §§ 16 and 37, all Oklahoma lands were declared to be agricultural, yet the act of March 2, 1895 (28 Stat. 876), and the act of June 6, 1900 (31 Stats. 676, 680), extended the mineral land law over the lands ceded to the United States by the Wichita, Comanche, Kiowa and Apache tribes of Indians in the then Territory of Oklahoma, and all such lands as contain valuable mineral deposits are open to location and entry under the existing mining laws of the United States. (Instructions, 31 L. D. 154, 32 L. D. 95. As to mineral lands on the reservation of the Mintal and White River tribes of the Ute Indians, see Act of May 27, 1902, 32 Stat. 263; on the Uncompahgre Reservation, Act of March 3, 1903, 32 Stat. 998; on the Flathead Reservation, Act of April 23, 1904, 33 Stat. 302; on the Yakima Reservation, Act of Dec. 21, 1904, 33 Stat. 595; on the Shoshone or Wind River Reservation, Act of March 3, 1905, 33 Stat. 1016; on the Colville Reservation, Act of March 22, 1906, 34 Stat. 80; on the Coeur d'Alene Reservation, Act of June 21, 1906, 34 Stat. 336).

The mining laws are also extended to saline lands by the act of January 31, 1901, 31 Stat. 745 (See chap. XVII, div. II, below).

The acquisition of title to public mineral lands in the Philippines is governed by the act of Congress of July 1, 1902, c. 1369 (32 Stat. 691), which is a comprehensive code covering the entire subject so far as those islands are concerned.

It has been held in the courts of California and Montana that mineral taken from the unappropriated public land is the property of the first taker, there being an implied license to the prospector to take and apply to his own use whatever he finds in the course of his explorations, whether they be followed by location or not. The question whether title to such minerals can be maintained as against the government has not been raised.

California.

Burns v. Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233 (1901), followed in *Burns v. Schoenfeld*, 1 Cal. App. 121, 81 Pac. 713 (1905). Where persons go upon public land which they have not located, but with the intention of ultimately acquiring title for the purpose of erecting a mill, and engage laborers to grade the land, a laborer who discovers gold, which he mines and takes possession of, is entitled thereto as against his employer. Mere occupancy of a thing as against all except the state is a sufficient title. Where things are found that have no owner, they belong, as in a state of nature, to the first occupant or fortunate finder (2 Blk. Com. 402; 1 Id. 295), and in the case of valuable mineral deposits, the title of the first taker is confirmed by express statutory grant in U. S. Rev. St. 2319.

Defendant's occupation of the land was not such as to give basis of title, and therefore he could not on that ground claim the mineral, nor could he claim it under Cal. Civ. Code, §1985, on the ground that plaintiff acquired it "by virtue of his employment", the object of the grading not being the acquisition of ore to be extracted.

Montana.

Sullivan v. Schultz, 22 Mont. 541, 57 Pac. 279 (1899). "The cutting of timber upon the public domain is prohibited by law, but there is no such prohibition touching the deposits of mineral upon the public lands. Under the law they are all free and open to exploration and occupation by the citizen for his own profit. This applies to all lands containing valuable deposits, including building stone. Rev. St. U. S. § 2319; Act Cong. Aug. 4, 1892 (27 Stat. 348). The right thus granted necessarily carries with it the license to take what may be found in the course of exploration and apply it to the discoverer's own use. The option is left to him to acquire the exclusive right to the land containing the deposit; but, if he does not choose to do so, he may still avail himself of the deposit, exclusively or in common with others, until some one else acquires the exclusive right from the government."

I. WHAT LAND IS OPEN TO LOCATION AS MINERAL LAND.

p. 196.

United States.

Lockhart v. Johnson, 181 U. S. 516, 45 Law. Ed. 979 (1901). Mineral lands which, although within the claimed limits of a Mexican grant, are not within its actual limits, are open to exploration and appropriation under the mineral land law. The fact that the claim under this grant was sub judice at the time of the mineral location does not affect the status of the land as public land. "Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an executive withdrawal under such authority, either expressed or implied. * * * There are no words in the treaty with Mexico expressly withdrawing from sale all lands within the claimed limits of a Mexican grant, and we do not think there is any language in the treaty which implies a reservation of that kind. Whatever reservation there is must be looked for in the Statutes of the United States, and we are of opinion that there is no such reservation and has been none since the repeal of the eighth section of the act of 1854."

Thallmann v. Thomas, 49 C. C. A. 317, 111 Fed. 277 (1901). 8th Circ. Public land of which another person has the possession and the right of possession under a lawful location is not open to location; but if it is in the possession of those who have no superior right to acquire title or to retain possession, any competent locator has the right to initiate a lawful claim thereto by peaceable adverse entry and location, but not by forcible entry.

Brown v. Gurney, 201 U. S. 184, 50 Law. Ed. 717 (1906), affirming *Gurney v. Brown*, 32 Colo. 472, 77 Pac. 357 (1904). The land department gave a claimant the right to elect which of two disconnected tracts he would select for patent, and in case of failure within sixty days to make such election or to appeal from the land department's decision, the government reserved the right to cancel the entry on a certain one of the two tracts, but the government took no steps thus to cancel said entry, and finally after three years the claimant, who had not appealed from the decision of the land department, filed his election to proceed for patent on a designated one of the tracts. The unselected tract was not open to location by other persons until such election was filed, and any such location, therefore, made thereon before such time, was invalid.

Webb v. American Asphaltum Min. Co., 84 C. C. A. 651, 157 Fed. 203 (1907). 8th Circ. See this case under "Lode Claims," chap. XV, div. I.

Alaska.

Alaska Gold Min. Co. v. Barbridge, 1 Alaska, 311 (1901). Land under the sea, below mean high tide, may not be located under the mineral land law.

Behrends v. Goldsteen, 1 Alaska, 518 (1902). No mineral location can be lawfully made upon lands reserved from sale by the government.

Heine v. Roth, 2 Alaska, 416 (1905). In Alaska, navigable rivers are deemed public highways so that no location under the mining laws can be made of their bed or of land lying between high and low-water mark.

California.

Conway v. Hart, 120 Cal. 480, 62 Pac. 44 (1900). As against a subsequent locator who asserts no title antedating his location, very little evidence is required to establish the fact that the premises claimed were vacant public land, subject to appropriation.

Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176 (1908). Gypsum is a mineral, and lands containing it are mineral lands, within the meaning of the statutes of the United States. To establish the existence of a mineral deposit under Rev. St. §§ 2318 and 2319, "it is not enough that there be some trace or indication of mineral in the land. There must be minerals 'in such quantity as to justify the expenditure of effort to extract them.' * * * It is not necessary, however, that mineral of sufficient amount and value to allow immediate profitable working be shown to exist in the land. It is enough if the vein or deposit has a present or prospective commercial value."

Colorado.

McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538 (1905). See this case under chap. XIV, div. II.

Hoban v. Boyer, 37 Colo. 185, 85 Pac. 837 (1906). "A valid lode mining location must be upon unoccupied and unappropriated public domain. In a suit in support of an adverse claim, the defendant may show that the plaintiff's location was made upon ground embraced within a prior, valid, subsisting location, and if he succeeds in the same, it is a bar to plaintiff's recovery."

Walsh v. Henry, 38 Colo. 393, 88 Pac. 449 (1906). It is not the law that it is necessary that a locator honestly believe the ground embraced in a claim to be unoccupied and unappropriated public domain, open to location, before he can initiate his location upon such claim. If A.'s location is invalid because of the absence of a discovery cut at the time B. made peaceable entry, then the territory was at the time open to location under the mining laws, and B. can lawfully initiate his location within the boundaries of the claim irrespective of what his belief was as to the territory being unoccupied and unappropriated. If the location by A. was invalid for such reason it was immaterial to the validity of B's location that B. knew that the claim of A. had been surveyed for patent and the boundaries had been marked on the ground, and that the situs of the claim was known to him, and that A. had posted his patent plats and notices. If the location of A. was invalid, B. was not a trespasser.

Montana.

Murray v. Polglase, 23 Mont. 401, 59 Pac. 439 (1899). Where a receiver's receipt, showing that the entryman is entitled to a patent, is subsequently canceled for fraud because of the entryman's having falsely represented to the receiver that he had done sufficient work upon the claim to entitle him to a patent, the entryman is in no better position than if he had obtained no such receipt at all, and he cannot be heard to take advantage of his own fraud by declaring that during the time the receipt was outstanding the land was withdrawn from the public domain. If a valid location was made in the meanwhile by another party, it is good as against the original entryman.

Oklahoma.

Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936 (1903). Under the acts of Congress of June 6, 1900, c. 813, §6 (31 Stat. 676), and March 31, 1901, c. 846, §1 (31 Stat. 1093), and the proclamation of the president opening to settlement lands acquired by treaty from the Comanche and other Indian tribes, no one was permitted to occupy any of said lands for the purpose of making mineral locations until the expiration of sixty days from the date of the proclamation, and an entry prior to that time could confer no rights.

It is only when lands containing petroleum and other mineral oils are chiefly valuable for the mineral oils that such lands are subject to entry and location as placer mining claims, and whether such land is chiefly valuable for its mineral oils is a question of fact to be proved by the person alleging its mineral character, as against the homestead entry, and such question of fact is to be heard and determined by the land department. Until such time the courts may preserve the possessory rights of the legal occupants against continuous trespassing by injunction. See this case also under chap. XVI, div. IV.

LAND OFFICE DECISIONS.

Land chiefly valuable for deposits of marble is mineral within the meaning of the mineral land law and also within the exception from railroad and school grants. The whole subject is reviewed and it is held that the term is not confined to metalliferous minerals but includes "whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes." *Pacific Coast Marble Co. v. Northern Pac. R. Co.*, 25 L. D. 233 (1897).

Land chiefly valuable for deposits of fire clay is subject to location and entry under the mineral land law. *Alldritt v. Northern Pac. R. Co.*, 25 L. D. 349 (1897).

Lands chiefly valuable for deposits of petroleum are subject to location and entry as placer claims. *Union Oil Co.*, 25 L. D. 351 (1897).

Lands valuable for deposits of phosphates are mineral. *Florida Cent. & Peninsular R. Co.*, 26 L. D. 600 (1898).

Land containing a deposit of gypsum and more valuable therefor than for agriculture is not subject to agricultural entry. *Phifer v. Heaton*, 27 L. D. 57 (1898).

Guano is a mineral and lands valuable for deposits of guano are subject to location as mineral lands and are not subject to selection under a grant to the state for an agricultural college. *Richter v. Utah*, 27 L. D. 95 (1898).

Land selected for a reservoir site under acts of Congress of Oct. 2, 1888 (25 Stat. 526), and Aug. 30, 1890 (26 Stat. 391), is not open to location. But location having been made and patent applied for, the entry will be suspended to await further action of the proper authorities, in the actual location of the reservoir, and if it shall then appear that the land is not required for the purpose, the entry may be completed. *Colomokas Gold Min. Co.*, 28 L. D. 172 (1899).

By act of Congress of June 7, 1897 (30 Stat. 87), the lands of Uncompahgre Indian Reservation, not theretofore allotted in severalty to the Indians, were opened to location on April 1, 1898, "under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite or other like substances," the title to which was reserved to the United States. *Instructions*, 28 L. D. 88 (1898).

Procedure for purchase and patent for lands in Fort Belknap Indian Reservation, which were opened to location by Act June 10, 1896, § 8, must be the same as in case of other mineral lands and the requirements of Rev. St. 2325 and 2326 must be followed. *Eureka & Try Again Lode Claims*, 29 L. D. 158 (1899).

Land more valuable on account of the sand stone it contains than for agricultural purposes is mineral and should be so classified under act of Feb. 26, 1895. *Beaudette v. Northern Pac. R. Co.*, 29 L. D. 248 (1899).

Tide lands in Alaska are not public lands belonging to the United States within the meaning of the mineral land law and rights thereto cannot be acquired under that law. *James W. Logan*, 29 L. D. 395 (1900).

The forest reserve act of June 4, 1897, "specifically provides that nothing therein shall prohibit any person from entering upon such reservations, under rules and regulations to be prescribed by the Secretary of the Interior 'for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof' or from making any entry of 'any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States, and the rules and regulations applying thereto.' Prospecting, locating, developing and making entry of mineral lands in forest reservations are thus clearly and distinctly authorized and made lawful. It is not necessary therefore that such lands should first be eliminated from such reservations and restored to the public domain before they can be prospected, located, developed or entered under the

mining laws. Subject to the requirement that * * * 'the rules and regulations covering such forest reservations must be complied with,' the status of the mineral lands in forest reservations does not differ in any respect from that of lands of the same character outside of such reservations." Coal lands are mineral lands within the meaning of this statute. *T. P. Crowder*, 30 L. D. 92 (1900).

The land containing the entrance to, and the explored portion of, Wind Cave, a huge cavern, with hundreds of irregularly shaped chambers and passages containing large quantities of crystalline deposits and formations such as stalactites, stalagmites, geodes, etc., valuable not as minerals, but as natural curiosities, and not containing in paying quantities deposits of substances usually developed by mining operations, is not mineral land within the meaning of the mining laws. *South Dakota M. Co. v. McDonald*, 30 L. D. 357 (1900).

Lands containing deposits of ordinary brick clay are not mineral lands within the meaning of the mining laws, and are not subject to entry as such although more valuable for the manufacture of bricks from the clay than for agricultural purposes. "No standard authority has been found which, in direct terms, says that ordinary brick clay is mineral, while it is a well known fact that such clay exists generally throughout the entire country, in quantities more or less varying, and that the lands where found, as a rule, are valuable for agricultural purposes." *King v. Bradford*, 31 L. D. 108 (1901).

Valuable mineral deposits which may be found upon land allotted in severalty to an Indian under the act of June 6, 1900 (31 Stat. 672, 680), are not withheld from the allottee or reserved to the United States, and cannot be acquired under the mining law, but may be leased under the general statute relating to the giving of mining leases by Indian allottees.

The provision of that act which reads "That should any of said lands allotted to said Indians, or opened to settlement under this act, contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act; and the mineral laws of the United States are hereby extended over said lands," does not subject to the mining laws lands which have been allotted to Indians or lands to which a homestead entryman has acquired fixed and vested rights by reason of his compliance with the homestead laws, but the body of lands which were to be allotted or opened to settlement under the act so far as they should be found to contain valuable mineral deposits, and only so long as they should remain free from any vested right of ownership in an individual, Indian or white. *Acme Cement & Plaster Co.*, 31 L. D. 125 (1901).

Lands covered by an existing mineral entry are not subject to location, but upon cancellation of such entry they become subject to location from that date, and a prior location becomes effective if rights thereunder are then being asserted, and are thereafter asserted according to the mineral land law. The question arose in this case between claimants neither of

whom was the original applicant. *Adams v. Polglase*, 32 L. D. 477, 33 L. D. 30 (1904). (See *Noonan v. Caledonia Gold Min. Co.*, 121 U. S. 393, 30 Law. Ed. 1061; *Kendall v. San Juan M. Co.*, 144 U. S. 658, 36 Law. Ed. 583, vol. 1, pp. 545, 546.)

Sections 16 and 36 in the Cherokee Outlet, reserved by the act of March 3, 1893, and subsequently granted to Oklahoma for school purposes, are not open to exploration, location or entry under the mineral land law. *E. A. Shirley*, 35 L. D. 113 (1906).

Lands in Bitter Root Valley ceded to the United States under treaty with the Flathead and other Indians, ratified March 8, 1859, are not subject to entry under the mineral land law. *Dayton and Freeman and Other Placer Claims*, 35 L. D. 444 (1907).

Sections 16, 36, 13, and 33 of the land ceded by the Comanche, Kiowa and Apache Indians under agreement ratified by act of June 6, 1900, reserved for school and other purposes, are not subject to the operation of the mining laws. The like numbered sections ceded by the Wichita and affiliated bands of Indians under agreement ratified by act of March 2, 1895, are subject to those laws. *Gypsite Placer Min. Claim*, 34 L. D. 54 (1905).

Lands in Greer County, Oklahoma, opened to entry by the act of January 18, 1897, are not subject to disposal under the mineral land law. *Lenertz v. Malloy*, 36 L. D. 170 (1907).

II. WHO MAY LOCATE A MINING CLAIM.

A. *Citizenship of the United States the Essential Requisite.*

p. 202. Whatever difference of opinion may formerly have existed as to the right of private parties to attack the validity of a location on the ground that the locator lacked the essential of citizenship has now been set at rest by the supreme court of the United States. The government only may raise the question of alienage. The grantees of the public land take by purchase, and the objection to the personal incapacity of the grantee can only be raised by the government. Citizenship, therefore, is not a condition of location. An alien may locate and hold a mining claim so long as he does not seek a patent, subject only to the possibility of being dispossessed upon the action of the government. It follows, therefore, that in actions between private parties based upon possessory titles, it is not necessary either to allege or to prove the citizenship of the locators.

When, however, application is made for a patent, the status of the applicant becomes essential. Citizenship is a condition of

his obtaining title, and must be established in the manner prescribed by the statute. It is a corollary to this proposition that it must be proven, if traversed in an action on an adverse claim; for in such an action the right to receive the government title is at issue. In this action, therefore, a private party may attack his opponent's title on the ground that he is an alien.

The citizenship of stockholders of a corporation, claiming either as a locator or as an applicant for a patent, is not the subject of inquiry. All the stockholders of any corporation organized under the laws of the United States or of any state or territory thereof are conclusively presumed to be citizens. (Rev. St. 2321; 27 L. D. 178.)

An exception to the principle that citizenship is an essential of location was created by the act of Congress of May 14, 1898, § 13, 30 Stat. 415, which conferred on native born citizens of Canada the same right of acquiring title to mineral lands in Alaska as were given to citizens of the United States in British Columbia and the northwest territory. This statute, however, has been held by the land department to be inoperative, because the only right which may be acquired in public lands in Canada is a leasehold, and the laws of the United States make no provision for leasing mineral lands in Alaska.

United States.

Lone Jack Min. Co. v. Megginson, 27 C. C. A. 63, 82 Fed. 89 (1897). 9th Circ. The question of want of citizenship of a locator can only be raised by the United States (*Billings v. Aspen M. & S. Co.*, vol. 1, p. 205, followed). Where an alien locator makes his declaration of intention, it relates to the date of the location, and in the absence of intervening rights, operates to validate the location.

Tornances v. Melsing, 47 C. C. A. 596, 109 Fed. 710 (1901). 9th Circ. The rule that the location of a mining claim cannot be questioned in an ordinary suit between private parties, on the ground of the alienage of the locator, applies to mining claims in Alaska. "When the bill which provides for a civil code for Alaska was pending in Congress, the Senate refused to modify the rule laid down by *Manuel v. Wulff* (vol. 1, p. 205) and rejected an amendment to the bill, which was introduced for the purpose of conferring upon the district court of Alaska the power to inquire into and to determine the question of the citizenship of a locator of mining claims in that district."

McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563, 46 Law. Ed. 331 (1902). In an action to recover mining claims, plaintiffs

claiming as locators are not bound to prove citizenship. "That grantees of the public land take by purchase this Court, in *Manuel v. Wulff*, left no doubt. It was said that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession." An alien purchaser can hold until office found. This is not affected by § 500 of the Oregon Code. "The meaning of *Manuel v. Wulff* is that the location by an alien and all the rights following from such location are voidable and not void, and are free from attack by any one except the government."

Shea v. Nilima, 66 C. C. A. 263, 133 Fed. 209 (1904). 9th Circ. The fact that a mining claim is located by an alien can only be taken advantage of by the government. The location is not illegal or void, but, at most, is only voidable by the act of the government. A subsequent declaration of intention by a locator, or one having an interest in the claim, prior to the inception of any adverse rights, relates back to the date of the location, or acquisition of the alien's interest therein, and validates the transaction.

Arizona.

Providence Gold Min. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641 (1899). Where one of two locators of a mining claim is a citizen of the United States, his rights cannot be defeated by the fact that the other is not a citizen, and the whole claim will not be made invalid or opened thereby to relocation. And the two locators having joined in a conveyance, their deed transferred to the grantee a valid mining location, unaffected by the noncitizenship of one of the locators.

Arkansas.

Matlock v. Stone, 77 Ark. 195, 91 S. W. 553 (1905). A location of a mining claim by an alien is voidable only, not void, and is free from attack by any one except the government. But an action on an adverse claim, a proceeding in which a patent for government land is applied for by one party and resisted by another, is a proceeding on behalf of the government in which the citizenship of the applicant is a material fact to be alleged and proved.

California.

Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540 (1909). The question of the qualification of a locator of a mining claim, so far as the same is affected by his alienage, is one which cannot be raised or determined in actions between private individuals in which the United States is not a party.

Colorado.

Jackson v. White Cloud Gold Min. & Mill. Co., 36 Colo. 122, 85 Pac. 639 (1906). In an action on an adverse claim where the complaint alleges and

the answer admits that the plaintiff was a corporation organized and existing under the laws of Colorado, it is not necessary to prove the citizenship of the stockholders thereof. It is conclusively presumed that the stockholders are all citizens of that state.

Utah.

Wilson v. Triumph Consol. Min. Co., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 718 (1899). Where one, though not a citizen of the United States, performed all the acts necessary to a valid location of a mining claim, claimed to be the owner thereof, and performed the assessment work as required by law, and transferred his rights to one who was a citizen of the United States, and subsequent to such transfer a third person attempted to effect a relocation on the ground that the first one was invalid, the transferee of the first locator, though an alien, is held to have good title.

"As a general rule, it is true that only citizens of the United States can locate mining claims; but it has been held in the case of *Manuel v. Wulff*, 152 U. S. 505, 38 Law. Ed. 532, that this is a question that can only be asserted by the government. * * * These rules may be subject to the limitation that a qualified locator may relocate the claim in the possession of an alien, who has not declared his intention to become a citizen, if such relocation be made without force or violence, and prior to the declaration of intention of naturalization of the alien or conveyance of his rights to the claim to a citizen. As against a mere intruder or trespasser, or one having no higher or better right than the occupant, possession of the mineral claim is prima facie evidence of a right of possession whether the occupant be an alien or not. But as against one connecting himself with the government title, this mere occupancy must yield to the higher right."

Strickley v. Hill, 22 Utah, 257, 62 Pac. 893, 83 Am. St. Rep. 786 (1900). The rights of a citizen locator of mining ground and his subsequent grantees cannot be affected by the fact that his colocator was an alien. If a citizen and an alien jointly locate a claim not exceeding the amount of ground allowed to one locator, such location is valid as to the citizen, or to one who has declared his intention to become such; and a conveyance by him, through an alien, to another citizen, conveys a complete title to the claim located, provided all other provisions of the law were complied with and there be no intervening rights.

An alien who has declared his intention to become a citizen by enlistment in the United States army under U. S. Rev. St. 2166 may, under the provisions of § 2319, locate mineral lands upon the unoccupied public domain.

Citizenship, which may be proved like any other fact, and is a question for the court and jury to pass upon, or a declaration of intention to become such citizen, must be shown in a suit on an adverse claim under Rev. St. 2326.

Stewart v. Gold & Copper Co. of Bingham, 29 Utah, 443, 82 Pac. 475, 110 Am. St. Rep. 719 (1905). The location of a mining claim by an alien is not void but merely voidable and may be cured by conveyance to a citizen.

The location made by an alien is not open to attack by any one upon the ground of his want of citizenship except the government.

Washington.

Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817 (1905). In an action in support of an adverse claim to an application for patent, the defendants admitted, so far as they were concerned, that the plaintiff was a citizen of the United States at the time he made his location. There was also admitted in evidence an affidavit by the plaintiff that he was a citizen of the United States at the time his location was made. Held that this evidence was sufficient to establish prima facie the citizenship of the plaintiff.

LAND OFFICE DECISIONS.

The act of March 2, 1897, in defining and regulating the rights of aliens to acquire real estate in the territories, has reference only to lands the title to which has passed from the United States and become the subject of private ownership, and does not confer upon aliens the privilege of occupying or purchasing mining claims from the government under the mining laws.

Any restriction placed by § 2, act of March 3, 1887, upon the acquisition of public lands by a corporation in which a part of the stock is owned by persons, corporations or associations, not citizens of the United States, was removed by the act of March 2, 1897, so that now a corporation organized under the laws of the United States, or any state or territory thereof, may occupy and purchase mining claims from the government, irrespective of the ownership of stock therein by persons, corporations, or associations, not citizens of the United States.

Under the mining laws as at present existing in the United States, and the Dominion of Canada, the provisions of § 13, Act of May 14, 1898, according certain privileges in Alaska to citizens of the Dominion, are inoperative. *Opinion*, 28 L. D. 178 (1899).

A location by an alien is not void, but voidable; and his declaration of intention made before a relocation or attempted relocation of the ground relates back to the date of his location and validates it. Upon declaring his intention he was entitled to the advantage of work previously done and of the record previously made by him in the location of his claim. *McEroy v. Megginson*, 29 L. D. 164 (1899).

The intention to become a citizen must be a bona fide existing one at the time of purchase in order to entitle the applicant to a patent. The question of abandonment of that intention was raised but not decided for want of sufficient evidence. *Saturday Lode Claim*, 29 L. D. 627 (1900).

B. Other Qualifications of Locators.

p. 208. Rev. St. 452 prohibits officers, clerks and employes in the general land office, from directly or indirectly purchasing or becoming interested in the purchase of any public land. An entry by such an employe is therefore void (*Prosser v. Finn*, 208 U. S. 67, 52 Law. Ed. 392). A deputy United States mineral surveyor is an employe within the meaning of this statute (*Floyd v. Montgomery*, 26 L. D. 122; *Frank A. Maxwell*, 29 L. D. 76; *W. H. Leffingwell*, 30 L. D. 139; *Seymour K. Bradford*, 36 L. D. 61; *Lavagnino v. Uhlig*, 26 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808; *Waskey v. Hammer*, 95 C. C. A. 305, 170 Fed. 31; contra, *Hand v. Cook*, 29 Nev. 518, 92 Pac. 3).

Washington.

Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079 (1906). In an issue to determine priority of possession of mining ground on the public domain, the minority of one of the parties is not a material question and cannot be taken advantage of in the absence of positive law forbidding location by a minor.

C. Location by Agent or Partner.

p. 208.

United States.

Royston v. Miller, 76 Fed. 50 (1896). C. C. D. Nev. See this case under chap. XII.

Lockhart v. Johnson, 181 U. S. 516, 45 Law. Ed. 979 (1901). P. for himself and L. & J. discovered and located a mine, and then conspiring with the defendants incurred a forfeiture, whereupon the defendants entered and made a valid location. L. could not recover in ejectment, which is a purely legal action and in which the plaintiff must recover on the strength of his own title or not at all. "If he have rights as a copartner or cotenant with Pilkey, and he claims that the acts of the latter inure to his benefit in any way, his rights under such circumstances can be enforced in equity. *Turner v. Sawyer*, 150 U. S. 578, 586, 37 Law. Ed. 1189. In relation to mining it has been held that the remedy in the case of a claim in the nature of that which the plaintiff herein sets up is against the copartner or cotenant by an action for a breach of his contract or to establish and enforce a trust in the claim as relocated against the parties relocating. *Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361; *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911."

McCulloch v. Murphy, 125 Fed. 147 (1903). C. C. D. Nev. "There is nothing in the mining laws that prohibits one from initiating a location of a mining claim by an agent. It is not necessary that a party should personally act in taking up a mining claim, or in doing the acts required to give evidence of the appropriation, or to perfect the appropriation."

Shea v. Nilima, 66 C. C. A. 263, 133 Fed. 209 (1904). 9th Circ. An agreement between two or more persons to explore the public domain, and discover and locate a mining claim or claims, for the joint benefit of the contracting parties, does not fall within the statute of frauds, and need not be in writing. If, in pursuance of the agreement, one of the parties locates the claim in his own name, he holds the legal title to the interests of the others in trust for them.

Cascaden v. Dunbar, 84 C. C. A. 566, 157 Fed. 62 (1907). 9th Circ. The plaintiff entered into an oral agreement with the defendants by which he was to prospect for and stake placer claims in the names of the defendants, in consideration of which they were to record the locations and perform the other requirements and convey to plaintiff a one-half interest therein. The defendants failed to record the certificates for the claims which plaintiff located in their names, and subsequently located the ground themselves. They were held to be trustees for the plaintiff as to one-half of the re-located claims and required to convey that interest to him. The agreement was not within the statute of frauds. See this case also under chap. XXIV, div. III.

Cook v. Klonos, 90 C. C. A. 403, 164 Fed. 529 (1908). 9th Circ. One who uses the names of his friends, relatives or employes as dummies, to locate for his own benefit a greater area of mining ground than that allowed by law (an association placer claim of 160 acres), commits a fraud on the government and violates the law. "The scheme of using the names of dummy locators in making the location of a mining claim for the purpose of securing a concealed interest in such claim appears to be contrary to the purpose of the statute; but when this scheme is used to secure an interest in a claim for a single individual, not only concealed but in excess of the limit of 20 acres, it is plainly in violation of the letter of the law, and when, as in this case, all the locators had knowledge of the concealed interest and were parties to the transaction, it renders the location void."

Hendrichs v. Morgan, 92 C. C. A. 558, 167 Fed. 106 (1909). 9th Circ. The parties verbally agreed to locate a claim for their joint benefit, and together performed the acts of location and the necessary development work. The claim, however, was located in the name of H. Although there was no mining partnership, the facts imposed a resulting trust for the benefit of M. to the extent of his half interest. "The case comes within the class of judicial exceptions created by equity to prevent the use of the statute of frauds in support of inequitable and fraudulent schemes."

Alaska.

Reedy v. Wesson, 1 Alaska, 570 (1902). A locator of a mining claim, who locates in his own name, but for the benefit of himself and other partners,

becomes a trustee for the benefit of all the other partners. The mere fact that the location notice is in his name gives him no exclusive title to the property, and does not empower him to convey the claim to the exclusion of his cotenants.

Where one purchases a mining claim from the owner of record, who in reality holds partly in trust for cotenants, and these cotenants are, at the time of such purchase, in open and notorious possession of the property, he takes subject to their rights in the property.

McMahon v. Mechan, 2 Alaska, 278 (1904). Where an agent locates a mining claim for his principal, without any contract to acquire an interest therein, his act inures to the benefit of his principal; but where two persons agree in writing to locate mining claims for their joint benefit, the ground which is located by one in his own name becomes their common property.

Thompson v. Burk, 2 Alaska, 249 (1904). Defendant located a placer mining claim but made no discovery. Subsequently, plaintiff relocated the claim and thereafter, without notifying defendant of his relocation, agreed with defendant to do the necessary work on the claim for discovery and prospecting. Upon discovery being made, it inured to the benefit of defendant's claim. "If an agent locates land for himself which he ought to locate for his principal he will be declared by a court of equity to hold it in trust for his principal." "An agent, trustee, or other person holding confidential relations with the original locator will not be permitted to relocate mining claims and secure to himself advantages flowing from a breach of trust obligations. The burden of proof, however, is upon the defendant to establish the agency in this case, and it must be done by full, clear and satisfactory evidence."

Windmuller v. Clarkson, 2 Alaska, 208 (1904). See this case under chap. XIII, div. I.

Marks v. Gates, 2 Alaska, 519 (1905). "A grubstake contract is an agreement between two or more persons to thereafter locate mines upon the public domain by their joint aid, effort, labor, or expense, whereby each is to acquire, by virtue of the act of location, such an interest in the mine as is agreed on in the contract. The title accrues to each as an original locator, though the location be made in the name of one or more of the parties only. Each party to the grubstake contract not named in the location notice becomes, nevertheless, an equitable owner and tenant in common with those named. Such a contract, when clearly established, will be enforced in equity."

Idaho.

Schultz v. Keeler, 2 Idaho, 305, 13 Pac. 481 (1887). It is not necessary to the validity of a location that the locator be present and participate therein. A location can be made by an agent.

New Mexico.

Eberle v. Carmichael, 8 N. M. 696, 47 Pac. 717 (1896), affirming 8 N. M. 169, 42 Pac. 95 (1895). Where several parties enter into an oral agreement by which one locates mining claims in his own name for the joint benefit of all, he holds the title in trust for the benefit of all and the agreement is not within the statute of frauds.

Washington.

Raymond v. Johnson, 17 Wash. 232, 49 Pac. 492, 61 Am. St. Rep. 908 (1897). Plaintiff and defendant agreed to prospect for diligently, locate and develop mining claims, etc., and upon discovery to locate, hold and work such claims jointly in their joint names in equal shares. Defendant, having discovered and located a claim without joining plaintiff, was held to be trustee for him to the extent of his half interest. Such contract is not within the statute of frauds.

Farwood v. Johnson, 29 Wash. 643, 70 Pac. 123 (1902). Where a number of persons own a mining claim in cotenancy, and the assessment work for one year has not been done, immediate relocation of the claim by one cotenant inures to the benefit of all the cotenants, and the mere fact that the relocation is made in the name of a stranger, in pursuance of a conspiracy to deprive the other co-owners of their interest in the claim, does not prevent the entry of the one cotenant from being the entry of all the cotenants.

Wyoming.

Whiting v. Straup, 17 Wyo. 1, 95 Pac. 849, 129 Am. St. Rep. 1003 (1908). See this case also on page 279.

CHAPTER VII.

DISCOVERY AND LOCATION OF CLAIMS.

I. Discovery of Ore.	(b) Contents of the Record.
II. Length of Time Allowed after Discovery to Perform Acts of Location.	(c) Verification of the Certificate.
III. Location of Claims.	(d) Amendment of the Record. Additional Certificates.
A. Marking the Location on the Ground.	(e) Mistakes in the Record.
B. Notice of Location; Posting of Notice.	(f) Requirements as to the Time and Place of Recording Certificate.
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(a) Its Nature and Necessity.	

I. DISCOVERY OF ORE.

p. 214. The discovery of minerals within the limits of the claim is an essential prerequisite to the location thereof, whether it be a lode claim or a placer claim. Minerals are discovered if they are actually found and are in such quantity as to justify the expenditure of time and money for their prospecting and development. Mere indications of the existence of the mineral claimed, however convincing, are insufficient. There must be an actual physical disclosure of its existence.

As between the government and the locator, it is unimportant in what order, chronologically, the latter performs those acts which are necessary to vest title in him. It is essential only that all of those acts shall have been performed. Although, therefore, the statute says that no location shall be made until this discovery of the vein or lode, yet, if no adverse rights intervene, it may follow the marking of the location or any of the other acts of location that may be prescribed by state or local regulations. The location based upon such a subsequent discovery is, in the absence

of intervening adverse rights, as valid as it would have been if the discovery had been the first step in the acquisition of title.

The locator need not be the first or original discoverer of mineral on the land in order to make a valid location. He may adopt the discovery of another and base his location upon that. It is only essential that he should have knowledge of the discovery and should claim it as the basis of his location.

While a discovery upon land already appropriated will avail nothing, in the first instance, yet it will become effectual if the locator acquires title to the ground and brings it within his lines before any conflicting claims arise. But such a discovery is not made effectual by a subsequent abandonment or forfeiture of the location by which the prior appropriation was made (*Farrell v. Lockhart*, 210 U. S. 142. See chap. XII, below).

The defect in a location which arises from the discovery having been made upon land appropriated by others may likewise be cured by subsequent discovery of mineral at another point within the limits of the claim and not upon previously appropriated land. In such a case the locator is in the same position as one who locates a claim without making discovery and validates it by a subsequent discovery before the intervention of other rights.

Discovery is as essential in the case of a placer location as it is in that of a lode location. It is now established that a single discovery is sufficient to hold a placer claim, whether it be a single claim of twenty acres or a claim of one hundred and sixty acres located by an association. In the latter case, however, it does not conclusively establish the mineral character of all the land included in the claim. That is open to further inquiry, but the burden of proof is on the person who raises the question.

In addition to the statutes cited in vol. 1, p. 216, n. 1, see Arizona Rev. St. 1901, § 3234; Idaho Civ. Code, §§ 2558, 2563; Montana Laws of 1907, p. 19; Nevada St. of 1907, p. 419; New Mexico Comp. Laws 1897, § 2298; North Dakota Pol. Code, §§ 1804, 1806; Oregon, 2 B. & C. Ann. Codes, § 3977; South Dakota Pol. Code, §§ 2536, 2538; Utah Laws of 1899, p. 26; Washington, 3 Bal. Ann. Code, § 3151a; Wyoming Rev. St. 1899, §§ 2548-2550.

United States.

Bonner v. Meikle, 82 Fed. 697 (1897). C. C. D. Nev. "It must be borne in mind that this is not a contest between two mining companies, both claiming the ground as mineral land, and each claiming to be the first locator, or the first to discover rock in place bearing mineral. In all such cases the question as to what constitutes a discovery of a vein or lode under the provisions of section 2320, Rev. St., is governed by the rule announced in *Book v. Justice Min. Co.*, 58 Fed. 106, 121, that, when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. This rule has always prevailed in the courts, as is clearly shown in the numerous authorities there cited. See, also, *McShane v. Kenkle*, 18 Mont. 208, 44 Pac. 979, 981, 56 Am. St. Rep. 578, 33 L. R. A. 851. Why? Because it was never intended that the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode. But where the rights of claimants to a town site, or to agricultural land, or as between the locators of a placer claim and others claiming a vein or lode to the same ground, are involved, other questions must be considered. In all such cases there are different statutes to be construed, and a somewhat different rule prevails. This is clearly stated by the court of appeals of this circuit in *Migeon v. Montana Cent. R. Co.*, 23 C. C. A. 156, 77 Fed. 249, 256. (See this case under chap. XV, div. 111.) In a case of contest between mineral claimants on one side and parties holding town-site patents on the other, the supreme court has repeatedly declared that under the acts of congress which govern such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must at that time be known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent."

Smith v. Newell, 86 Fed. 56 (1898). C. C. D. Utah. Mere proof of a record and the marking of a prior location will not defeat a subsequent location. The court will not presume a discovery from these.

Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801 (1898). 9th Circ. "The discovery was made in running a tunnel, where small seams of iron oxide, quartz and small quantities of carbonate of lead were found, two or three inches wide. These indications were of such character as miners in

that district would follow in the expectation of finding ore, and such as would justify miners in working a claim for that purpose. The rock in these seams was different from the country rock, and was of such character as is designated by the witnesses, who were practical miners, 'as a vein containing rock in place, bearing minerals.' These facts show that the location was made in good faith, and not 'simply upon a conjectural or imaginary existence of a vein or lode,' which cannot be permitted. *King v. Amy & S. Min. Co.*, 152 U. S. 222, 227, 38 Law. Ed. 419. The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located. *Erhardt v. Boaro*, 113 U. S. 527, 536, 28 Law. Ed. 1113. The subsequent developments made after the claim was located, and before the location of the Shoshone, show more clearly the existence of a lode or vein. We are of opinion that the testimony on behalf of appellees is sufficient to show a compliance with the provisions of section 2320, which requires that there must be a discovery of a vein or lode within the limits of the claim before a valid location thereof can be made."

Erwin v. Perigo, 35 C. C. A. 482, 93 Fed. 608 (1899), 9th Circ., affirming 85 Fed. 904. "The acts of congress prescribe two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode-mining claim. They are the discovery upon unappropriated public land of the United States within the limits of his claim of a mineral-bearing lode, and the distinct marking of the boundaries of his claim, so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but when these requirements have been complied with the land is no longer public, but the possession, the right to the possession, and the right to acquire the title are irrevocably vested in the locator."

Where both of these requirements have been met, although the discovery was made after the marking, the location is valid as against one claiming under a location subsequent to both.

"Moreover, there is no requirement in the legislation of congress that the discovery shall be made before the location, or that the location shall precede the discovery. The Revised Statutes simply provide that both acts shall be completed before the right of possession vests. There is no reason to be deduced from the acts of congress or from the nature of the case why a claim upon which the location was made before the discovery should be held void, while one upon which the discovery was made before the location should be held valid; and the rights of these locators should be left where the congress established them, valid and vested when both

acts have been done, regardless of their order, but void and ineffectual when the rights of others have intervened before either act has been completed. The order in which the statutory requirements for securing a lode mining claim are complied with is immaterial, so long as the rights of others do not intervene before they are complied with. The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date."

Crown Point Min. Co. v. Buck, 38 C. C. A. 278, 97 Fed. 462 (1899). 8th Circ. A location cannot be based on a discovery made within the limits of another subsisting claim, but it may be validated by relinquishment of the conflicting ground if made before the occurrence of intervening adverse rights.

Where such a location was made, a subsequent location, if made before the relinquishment, would be valid as to that portion not covered by the prior claim, that portion being at the time of the subsequent location unappropriated public land.

Nerada Sierra Oil Co. v. Miller, 97 Fed. 681 (1899). C. C. S. D. Cal. Under Rev. St. 2320, and 2329, there cannot be a valid location of a placer claim, without a prior valid discovery of mineral within the limits of the claim.

Nerada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673 (1899). C. C. S. D. Cal. One of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws is a discovery of minerals within the limits of the claim. Mere indications of the existence of the mineral are not sufficient, and do not constitute the discovery of the mineral itself. Discovery of sandstone and shale of a character that usually carry oil is not a discovery of oil.

It is immaterial, in the absence of any intervening rights, that the discovery of mineral is not made until after the posting of the location notice and the marking of the boundaries of the claim; that is, the order in which the statutory requirements are complied with is immaterial so long as the rights of others do not intervene before they are complied with.

"It is not necessary that a locator should be the first discoverer of mineral upon the land in order to make a valid location; but he must not only have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location."

Olive Land & Development Co. v. Olmstead, 103 Fed. 568 (1900). C. C. S. D. Cal. A location of a placer claim is totally invalid if no discovery of mineral has been made. Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them. This rule is applicable in a district of well known oil producing lands, where oil has not been actually discovered on the tract in question.

Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 182 U. S. 499, 45 Law. Ed. 1200 (1901). See this case under chap. XV, div. IV.

Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co., 125 Fed. 408 (1903). C. C. D. Nev. The Silver Top and Valley View lode claims were located by the same person on the same day, the latter being the first. Their lines overlapped, and the discovery shaft of the Silver Top was within the lines of that location and also within the lines of the Valley View. The conflict was afterwards adjusted by the owners of these claims, and the lines of the Valley View changed so as not to include the discovery shaft of the Silver Top. Additional discoveries were also made within the lines of the Silver Top and outside of the original lines of the Valley View within the 90 days allowed by the statute of Nevada for perfecting the location. Held that the Silver Top was a valid location, as against a subsequent conflicting location. "The change in the overlapping lines of the Valley View and Silver Top affected only the rights of the owners of those claims. No adjoining locator of other ground was affected thereby or could complain or take advantage thereof, because he was not injured thereby."

Walton v. Wild Goose Min. & Trading Co., 60 C. C. A. 155, 123 Fed. 209 (1903). 9th Circ. The discovery of mineral may be made by any agent or employe of the locator, or by any person acting in his behalf and for his benefit.

Creede & Cripple Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 49 Law. Ed. 501 (1905), affirming 57 C. C. A. 200, 119 Fed. 164. Where no adverse claims intervene, discovery need not precede the acts of location. "It would seem * * * that as between the Government and the locator, it is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location, and that if at the time of the entry every thing has been done which entitled the party to an entry, to-wit, a discovery and a perfect location, the Government would not be justified in rejecting the application on the ground that the customary order of procedure had not been followed. In other words, the Government does not, by accepting the entry and confirming it by patent, determine as to the order of proceedings prior to patent, but only that all required by law have been taken."

Chrisman v. Miller, 197 U. S. 313, 49 Law. Ed. 770 (1905), affirming *Miller v. Chrisman*, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444. To constitute discovery it is necessary that minerals should be found in such quantities as to justify expenditure for their development. The discovery of indications of petroleum, which consisted of oil in small quantities coming out of a spring and floating over the water, is insufficient.

"It is true that when the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a

case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining.

"Giving full weight to the testimony of Barleau we should not be justified, even in a case coming from a Federal court in overthrowing the finding that he made no discovery. There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploration for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it 'chiefly valuable therefor.' If that be true were the case one coming from a Federal court a fortiori must it be true when the case comes to us from a state court, whose findings of fact we have so often held to be conclusive."

Cascaden v. Bartolis, 77 C. C. A. 496, 146 Fed. 789 (1906). 9th Circ. In an action to recover possession of land which was part of the public domain, the plaintiff claimed under the location of a placer claim, and the defendants who had entered subsequently claimed the land as part of a town which was intended to be entered as a townsite. It was held to be error to charge the jury that the plaintiff must establish that the land contained mineral in such quantity as to pay a reasonable profit upon the labor and capital necessary to extract the mineral. The correct rule is that there must be such a discovery of mineral on the claim that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and labor in the development of the property.

Steele v. Tanana Mines R. Co., 78 C. C. A. 412, 148 Fed. 678 (1906). 9th Circ. The actual discovery of mineral is as necessary to the location of a placer claim as to the location of a lode claim. The finding of "colors of gold" which were fairly good prospects is not sufficient to establish the mineral character of the land as against a prior homestead entry. In such a case mineral must be discovered in such quantities as to justify a person of ordinary prudence in expending further labor and means with a reasonable prospect of success.

Lange v. Robinson, 79 C. C. A. 1, 148 Fed. 799 (1906). 9th Circ. The locator of placer claims along a creek in Alaska had washed on each a few pans of the sediment deposited along the sides of the creek, and had found small particles or colors of gold. Gold in paying quantities had been found on the bed rock on a tributary to the creek within a mile from these claims. This bed rock was from 125 to 150 feet below the surface. Plaintiff and other expert miners testified that the gold found was sufficient to justify the further expenditure of time and money in exploration. Held that there was a sufficient discovery to support the location as against subsequent mineral claimants.

Charlton v. Kelly, 84 C. C. A. 295, 156 Fed. 433 (1907). 9th Circ. In a case which arose between conflicting mineral claimants the court charged the jury that the mineral discovered must, in order to constitute a discovery, be of such quantity and character and found under such cir-

cumstances as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property. This was not error. The word "development" must have been understood by the jury as equivalent to exploration and not as having the broader meaning of opening up the whole claim and acquiring an exhaustive knowledge concerning its resources.

Biglow v. Conradt, 87 C. C. A. 48, 159 Fed. 868 (1908). 9th Circ. Plaintiff, after making discovery within the lines of his original claim, extended his boundaries so as to overlap the claim of defendant who had not yet made discovery, but who was in possession and working his claim. The first discovery in the overlap was subsequently made by the defendant whose occupation was not opposed by the plaintiff. Held that plaintiff's discovery related only to the original claim, and gave no right to the overlap.

Johanson v. White, 88 C. C. A. 83, 160 Fed. 901 (1908). 9th Circ. Where a location is made unaccompanied by discovery and another person openly enters upon the ground and makes a location, both locators being in possession by common consent. "It became a race of diligence between them to discover gold, and he who first discovered it undoubtedly obtained the prior right. His discovery did not relate back to the date of his location; but his location was made valid by discovery and took effect from that date, and it gave him the full right to the claim to the exclusion of all others." (*Crossman v. Pendery*, vol. 1, p. 217, followed.)

Cascaden v. Bortolis, 89 C. C. A. 247, 162 Fed. 267 (1908). 9th Circ. Where in an action to recover land, which the plaintiff claims under the mineral law, the question turns on the discovery of mineral, and there is evidence that gold has been found within the limits of plaintiff's claim, it is error to refuse to permit him to show the situation, character, value and mineralogical conditions of adjoining claims, and to prove by experienced miners that plaintiff was justified in expending time and money in prospecting and developing the ground claimed as valuable for mineral. "While mere possibility that ground claimed contains gold, or that there are mere indications of the existence of mineral in the ground, is not enough to justify a prudent person in expending money and work in exploration of it, yet where the evidence shows the actual existence of gold in the claim, and such evidence is of sufficient weight to submit to the jury upon the issue of discovery, we think the locator has a right to strengthen his proof upon any of the elements which enter into what is comprehended by discovery. In doing so, he may supplement the showing that mineral actually did exist by introducing evidence of the fact that, as a ground of justification for the expenditure of time and money, the adjacent ground in the same gulch is rich in the same mineral, or that adjacent claims were developed into paying mines after development upon similar showings of mineral, or that geological conditions are so similar that from the character of the mineral discovered, it is reasonable to expect to find mineral in valuable quantities in the exploitation of the ground staked."

Waskey v. Hammer, 95 C. C. A. 305, 170 Fed. 31 (1909). 9th Circ. A locator who had located a placer claim in excess of twenty acres drew in his lines so as to exclude the excess, and in so doing left outside of his boundaries the only place upon which he had at the time made a discovery. He therefore had abandoned one of the essential elements of his location. By maintaining his claim to the ground included within his readjusted boundaries and making the discovery of mineral therein before the acquisition of any right in the premises by any one else his right to the ground was perfected.

Hanson v. Craig, 95 C. C. A. 338, 170 Fed. 62 (1909), reversing 89 C. C. A. 55, 161 Fed. 861 (1908). Plaintiffs located an association placer claim with a width of 660 feet and a length of about two miles, but at the time made no discovery. They sunk a shaft to the depth of six feet and then left the ground, returning at the end of six days. In the meantime defendants located a claim which overlapped plaintiffs' claim. Subsequently discoveries were made on both claims, but the discovery of the defendants antedated that of the plaintiffs. The ground in conflict was held to belong to the defendants. See this case also on page 385.

Alaska.

Russell v. Dufresne, 1 Alaska, 486 (1902). A discovery is necessary to enable the claimant to make a valid location of a mining claim, but it is not necessary for the locator to do the actual manual labor of exposing the gold. He may employ others to do the work for him. It may be done in his absence, even without his knowledge.

Barnette v. Freeman, 2 Alaska, 286 (1904). "A placer mining claim is not perfected until mineral is discovered." Where A. located his claim by posting and marking, but did not make discovery or record until after B. had marked and recorded his location of the same ground, A's title was made good by subsequent discovery and record. When he made his discovery it inured to his benefit and when all the acts of location were completed he thereby segregated the ground from the public domain, and his former inchoate claim became complete and fixed.

Redden v. Harlan, 2 Alaska, 402 (1905). "A discovery of mineral is necessary to the validity of a placer mining claim. If the staking and recording shall follow after the date of a discovery they relate back to the discovery, and, in case no intervening rights have attached, perfect the claim as of that date. But it is not so with discovery. If the acts of staking and recording are performed first and discovery last, the validity and life of the claim begins only with the discovery."

Bulette v. Dodge, 2 Alaska, 427 (1905). "While marking, recording and discovery are each necessary to the creation of a valid placer claim, it is not material in what order they are performed. No claim, however, is perfected until discovery, and, as a general rule, if after A. has marked and recorded, B. marks, records and discovers mineral, the claim is B's."

Arizona.

Score v. Griffin, 9 Ariz. 295, 80 Pac. 331 (1905). The provision in Rev. St. 3220 that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located" is sufficiently complied with, where there is evidence that when the claim was located there was gold and silver bearing rock showing upon the surface of the claim.

California.

Adams v. Crawford, 116 Cal. 495, 48 Pac. 488 (1897). A. and B. discovered a lode on April 12, but left without making any location. They took samples of the vein and on May 8, A. returned and made a location. In the meantime C. discovered the same lode and located it on April 28. A. took no title by his location. The discovery vested no right or title to the property. "The discovery is but one step in acquiring title to a mining claim." It must be followed by a location.

Willeford v. Bell, 49 Pac. 6 (1897). A discovery which is not followed by a valid location does not withdraw the ground from appropriation by others.

Defendant made discovery in August, 1894, and posted notice giving dimensions of his claim but did not distinctly mark the claim on the ground. Plaintiff in February, 1895, made an independent discovery on what was presumed to be the same vein, posted notices, marked his claim and entered into possession. This claim included a part of the ground claimed by defendant. Held, in an action to quiet title, that defendant had no right to the ground in dispute.

Conway v. Hart, 129 Cal. 480, 62 Pac. 44 (1900). It was sufficient evidence of discovery by the locators that before locating they had sunk a shaft and taken a considerable amount of quartz rock from it which they knew to be rich, that the surveyor in measuring the claim had taken the direction of the vein from a line drawn from this shaft, that the direction of the vein was known to the locators when they made their location, and that the adverse claimant admitted the existence of a gold-bearing lode on the claim.

Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63 (1903), affirmed *Chrisman v. Miller*, 197 U. S. 313, 49 Law. Ed. 770, supra. "While perhaps it would be stating it too broadly to say that no case can be imagined where a surface discovery may be made of oil sufficient to fill the requirements of the statute, yet it is certainly true that no such case has ever been presented to our attention and that in the nature of things such a case will seldom, if ever, occur." It is immaterial, where there are no intervening rights, whether the discovery precedes or follows the performance of the other acts of location.

Where an association of eight persons make a placer location of 160 acres, a single discovery is sufficient to hold the entire tract.

Weed v. Snook, 144 Cal. 439, 77 Pac. 1023 (1904). The location of oil lands must be based upon the discovery of oil within the limits of the claim. Mere surface indications, such as seepage of oil, is not sufficient.

It is not necessary that discovery should precede location. A subsequent discovery will perfect the title unless rights of others have intervened.

The locator of an 80 acre placer claim on which he has discovered oil cannot avail himself of that discovery for the purpose of making a consolidated filing upon these 80 acres and an adjoining 80 acre tract upon which he has made no discovery, but upon which another was in possession prospecting for oil.

New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180 (1907). A discovery of minerals within the limits of a claim is as essential to the validity of the location in the case of placers as it is in the case of lode claims. Evidence of the finding on the land of some oil sand stained with oil and a ridge of fossil, and that oil had been discovered in the neighborhood two miles away, and that the geological formation indicated the probable existence of oil-bearing strata in the claim, do not constitute a discovery. "To constitute a discovery the law requires something more than conjecture, hope, or even indications."

Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001 (1907). Where an oil company bores wells on unsurveyed, unoccupied public land, and finding no oil or other mineral substance abandons the work, it acquires no rights as against those who subsequently appropriate the land for agricultural purposes.

Merced Oil Min. Co. v. Patterson, 153 Cal. 624, 96 Pac. 90 (1908). An association entered upon and occupied 160 acres of unoccupied mineral land of the United States. After marking boundaries and beginning work thereon, but before discovery, they conveyed forty acres. The grantee thereof subsequently made a discovery of oil on his tract. The effect of the conveyance, in the absence of any contrary understanding or agreement between the parties being to surrender to the grantee all of the right which the grantors formerly enjoyed in the portion conveyed, and to constitute it a separate and independent claim, the subsequent discovery of oil thereon by such grantee did not inure to the benefit of the association or the grantee of other portions of the claims so as to perfect the location thereof. Of course it might be otherwise were there an express agreement that, in consideration of the grant, the discovery of the grantee would inure to the benefit of the grantors or others of their grantees. So the assessment work done by the grantee who made the discovery cannot be taken as sufficient for any other grantee, unless expressly provided for.

Colorado.

Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69 (1896). A location cannot be based upon a discovery made within the limits of another patented claim.

Michael v. Mills, 22 Colo. 439, 45 Pac. 429 (1896). "The discovery must be made within the limits of the claim located and upon unappropriated territory." A location cannot be based upon a discovery upon an adjoining claim owned by the locator, upon a vein which if maintaining the same strike would pass into the claim attempted to be located, where as a matter of fact the vein is not traced or shown to have passed into the latter location.

Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30 (1897). A discovery to support a valid location must be upon unappropriated public land. Where the discovery was upon a prior valid subsisting location, the location based upon it is invalid.

Fleming v. Daly, 12 Colo. App. 439, 55 Pac. 946 (1899). Under Colo. Gen. St. § 2400, the discovery must be made in the discovery shaft, and for purposes of location a discovery outside of that shaft is not sufficient. Where a given formation is determined to be a lode, the walls are a geological necessity and it is not necessary that the discovery shaft expose the walls of the vein.

Brewster v. Shoemaker, 28 Colo. 176, 63 Pac. 309, 89 Am. St. Rep. 188, 53 L. R. A. 793 (1900). The order of time in which the requirements for a valid location are complied with is immaterial, provided that they all are complied with before intervening rights of third parties accrue. Hence, in the absence of intervening rights, a claim is valid although there is no discovery of mineral within the limits of the claim, until all the acts of location had been performed. "All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony which the law does not require, for the locators again to locate their claim, and refile their location certificate, or file a new one."

Defendants in driving a tunnel under another's land, under an agreement with the owner, struck a vein about 250 feet under the surface of the ground. Defendants ascertained how many degrees the vein dipped and calculated from that the point where the vein should come to the surface. Using this as an initial point, the boundaries of the claim were designated and all the statutory steps necessary for a location were taken, but no tracing of the vein upwards, nor any surface work was done. Held that this underground discovery was sufficient to furnish the basis for a valid location. "When, as in the case at bar, the discovery is made under ground upon the dip of the vein, it is fair to assume, in the absence of a contrary showing, that the vein extends upwards at the same angle; and a marking of the boundaries by making the place at which the vein, if continued to the surface, would be disclosed, the initial point, is a sufficient compliance with the law. * * * We do not think it necessary, in a discovery which is made underneath the surface, that the locator shall, at the risk of losing his claim, demonstrate by actual working that the top or apex is within the limits of his location."

McMillen v. Ferrum Min. Co., 32 Colo. 38, 74 Pac. 461, 103 Am. St. Rep. 64 (1902), rehearing refused 74 Pac. 464 (1903). The locator of a mining

claim need not be the first discoverer of a vein or lode in order to make a valid location; he may claim and adopt as his own, and base his location upon, a prior discovery of which he knew. But where a state statute requires that the locator sink a discovery shaft, showing a well defined crevice, and post at the point of discovery a location stake, a locator who digs a discovery shaft and posts a discovery stake at a particular point where there is no vein may not, after intervening rights have attached, abandon this point as his place of discovery and claim that his location was valid, because when the location was made he knew that there was a vein at another part of the claim some hundred feet from where his location certificate stated that he had made his discovery. "The fact that plaintiff's grantor knew and claimed that there had been a former discovery is not equivalent to, nor does it supply the place of, its selection by him as the one on which his location is based."

State courts will enforce the provisions of state laws requiring the sinking of discovery shafts and the doing of other acts of location not required by federal legislation.

Treasury Tunnel Min. & Reduction Co. v. Boss, 32 Colo. 27, 74 Pac. 888, 105 Am. St. Rep. 60 (1903). See this case on page 300.

Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054 (1905). A location based on a discovery within the limits of another existing valid location is void.

Moffat v. Blue River Gold Excavating Co., 33 Colo. 143, 80 Pac. 139 (1905). See this case under chap. XIII, div. I.

Idaho.

Ambergris Min. Co. v. Day, 12 Idaho, 108, 85 Pac. 109 (1906). While a valid mining location cannot be made upon loose debris or slide rock without first discovering a lode or vein therein, or upon a "hope or desire" to discover by future developments, yet as between prior and subsequent locators of the same ground as a lode claim, where the prior locator has discovered what he considers mineral indications and deposits, and has followed up that discovery by staking the claim and doing the necessary location work, and the latter comes along and makes a discovery, and locates a part or all of the same ground covered by the former location, and thereupon goes into court to contest the senior location, and in order to sustain that contest shows that the ground does in fact contain valuable mineral deposits as contemplated by § 2320, Rev. St. U. S., and at the same time contends that the senior locator has not made a mineral discovery, the courts will not examine the evidence of the senior discovery with very great strictness, as they would in a contest between a miner and agriculturist, but will view the evidence tending to establish the senior locator's discovery in the most favorable light such evidence will reasonably justify.

Evidence of indications successfully followed in the district and on contiguous ground in attempting to find a lode or mineral deposit is admissible in determining whether or not a valuable mineral discovery has been made by one who attempts to locate a lode claim on similar indications and showing upon adjacent ground.

Montana.

Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177 (1907). Section 3611, Pol. Code, provides that the locator of a lode claim must sink a discovery shaft upon the lode or vein to the depth of at least ten feet, or deeper, if necessary to show a well defined crevice or valuable deposit. It is declared that a crosscut which cuts the lode at a depth of ten feet below the surface is equivalent to a discovery shaft. Section 3612 provides for filing of record a declaratory statement, which shall state the dimensions and location of the discovery shaft or crosscut. Held (1) "The doing of this development work and the filing for record of the declaratory statement are purely statutory requirements which the state may rightfully exact in addition to the acts required by the federal statutes." (2) A crosscut which intersects or cuts the vein 132 feet below the surface, the only means of reaching which, however, is down a shaft located upon another claim, does not meet the requirements of the statute. The shaft must be sunk upon the claim, or the crosscut must be from an opening therein, the intention being that the shaft or crosscut together with the declaratory statement establish a permanent record available to any one who would examine.

Nichols v. Williams, 38 Mont. 552, 100 Pac. 969 (1909). The fact that the discovery shaft was partly within the boundaries of an adjoining claim is of no consequence, provided that portion which is within the boundaries of the claim in question is of such dimensions that it is in reality a shaft sunk upon that ground, visible to any one who might examine the ground.

Butte Northern Copper Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078 (1909). The statute does not require the locator to sink his discovery shaft at the point of discovery, but his location notice must be posted at that point.

Nevada.

Sisson v. Sommers, 24 Nev. 379, 55 Pac. 829 (1899). See this case on page 344.

Fox v. Myers, 29 Nev. 169, 86 Pac. 793 (1906). "When a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification, that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the court should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode."

Comp. Laws 1908 require that the notice of locaton be posted at the "point of discovery." Therefore, when a locator erects a location monument

and puts his location notice thereon, he in effect declares that at that point he has made a discovery; but inasmuch as the act does not require that the notice contain a recital that a discovery has there been made, the notice containing such recital is not prima facie evidence of a discovery.

Where conflicting claimants post their notices at the same point, a presumption is warranted that discovery exists and that both claim their discovery upon the same natural conditions.

Oklahoma.

Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936 (1903). It is essential to a valid location of oil land that oil has been discovered. A locator "is not permitted to file a location for the purpose of speculation or of prospecting for ore or oils. * * * Neither will mere surface indications support a location. It is the common experience of persons of ordinary intelligence that petroleum in valuable quantities is not found on the surface of the ground, nor is it found in paying quantities seeping from the earth. Valuable oil is found by drilling or boring into the interior of the earth, and either flows or is pumped to the surface, and until some body or vein has been discovered from which the oil can be brought to the surface, it cannot be considered of sufficient importance to warrant a location under the mineral laws." "If surface indications are found sufficient to warrant the prospector to spend his time and money on the property with the reasonable prospect of reaching deposits of greater commercial value, such indications will protect the prospector as against any new locator until he can follow up his indications and make the discovery. But such discovery is a condition precedent to a valid location."

Oregon.

Muldrick v. Brown, 37 Or. 185, 61 Pac. 428 (1900). No right can be acquired to a lode claim before the discovery of a vein or lode within its limits; but the finding of ore or metalliferous rock in place in a defined vein is sufficient to satisfy the statute, although it does not contain ore in paying quantities. If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spending his time or money upon it, it is sufficient, as against a subsequent locator for mining purposes.

LaGrande Inv. Co. v. Shaw, 44 Or. 416, 72 Pac. 795, 74 Pac. 919 (1903). It is necessary, first, that a vein or lode of rock in place bearing minerals exists within the boundary lines of the claim; and, second, that the person purporting to locate the claim has discovered this vein or lode, before the location of a lode claim can be made. A discovery after an attempted location may, however, take effect and validate the location by relation, provided no valid discovery and location by a third person has intervened.

South Dakota.

McPherson v. Julius, 17 S. D. 98, 95 N. W. 428 (1903). There can be no valid mining claim until a discovery is made within the lines of such claim and outside of the lines of any other valid existing lode location.

Utah.

Watson v. Mayberry, 15 Utah, 265, 49 Pac. 479 (1897). The location of a mining claim is absolutely void when its discovery point is within another valid claim. Where this occurs the locator can treat his location as void and make another location, placing his discovery at a point where there is valuable mineral, on ground subject to location. But in order that such change in the point of discovery may be effectual, to enable him to contest the extent of another's location, it must be made before such other person has perfected his location.

Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029 (1898). In order that a claimant may establish the validity of a location it is incumbent upon him to show the existence of mineral at the point of his discovery, or in its immediate vicinity; that is, that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locators, before the location was made, of the existence of mineral there.

U. S. Rev. St. 2320 does not require that the locator must be the original discoverer. It is sufficient if a discovery has been made and the locator has knowledge thereof.

Silver City Gold & Silver Min. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11 (1899). Where the original discovery of a vein upon which a location is based is included within the surface boundaries of a subsequent location, which goes to patent without protest from the owners of the prior location, but before such patent a new discovery has been made on the prior location, without the boundaries of the junior location as patented, and within the surface boundaries of the prior location as originally located, and development work is being there prosecuted in good faith by the owners of the prior location, their claim is valid, and holds as to all ground not included in the patent of the junior location, notwithstanding the loss of the original discovery.

Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019 (1901). There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metal at the place where the notice of location is posted, or in such proximity to it as to justify a reasonable belief in the existence of a lode there.

Rev. St. Utah, § 1496, provides that the locator must at the time of making a discovery erect a monument at the place of discovery and post his notice thereon; and § 1497 requires him to mark his boundaries within thirty days from the date of discovery. The plaintiff posted his notice on

February 6, 1899, and marked his boundaries on March 21, 1899. The evidence failed to show a discovery, and there was consequently no valid location. "To comply with the provisions of the Revised Statutes of this State and make a valid location of a mining claim, the locator must first discover a lode or deposit of mineral in place and then erect thereon, or in such close proximity thereto as to indicate the point selected as the place of discovery, a monument, and post thereon a notice of location, which must substantially comply with the requirements of said section 1496. When this is done, it fixes the discovery or initial point of the claim. To perfect his claim he must also, within the time and manner prescribed, mark the boundaries of his claim and file a copy of the notice of location for record. The boundaries so marked should conform substantially to the location indicated by the discovery monument and the notice of location." See this case also on page 288.

Reynolds v. Pascoc, 24 Utah, 219, 66 Pac. 1064 (1901). A location based on a discovery of minerals within the limits of another valid and subsisting location is invalid. "The same discovery point cannot be used for the location of two or more claims located upon the public domain."

Washington.

Protective Min. Co. v. Forrest City Min. Co., 51 Wash. 643, 99 Pac. 1033 (1909). In the absence of intervening rights, the failure to make a discovery until after the posting of notice and the marking of the boundaries is immaterial. Where the discovery follows from work subsequently done by the locator, his possessory rights under his location are complete from the date of the discovery.

National Mill. & Min. Co. v. Piccolo, 54 Wash. 617, 104 Pac. 128 (1909). A relocation is not complete until the provisions of the Laws of 1899, c. 45, § 8, in regard to the sinking of a discovery shaft, are complied with. The marking of the ground and posting of notices is not sufficient.

The proviso in § 9 that the provisions as to discovery shafts shall not apply west of the summit of Cascade Mountains does not apply to relocations which adopt existing discoveries.

Wyoming.

Whiting v. Straup, 17 Wyo. 1, 95 Pac. 849 (1908). X staked an 80 acre tract as an oil placer mining claim, posted notices, recorded, etc., but made no discovery. He then sold 40 acres to plaintiff, abandoning the remainder, but a few years later, as agent for defendant, entered the abandoned 40 acres, dug a well and struck oil. Held, whether the claim be lode or placer, discovery of minerals within its limits is essential to perfect a location, whether it precede or follow staking, recording, etc., being immaterial so long as there are no intervening rights. So at the time X sold to plaintiff he conveyed nothing. But did the subsequent discovery by X on the other half of the tract perfect this location? A placer claim is limited to 20 acres

for each individual locator and the aggregate that may be located as one claim by an association of persons is limited to 160 acres. When more than 20 acres is located as one claim it is now settled that one discovery is sufficient for the entire claim. What would have been the effect of this discovery had X made it in his own behalf is not decided, the agency for defendant being clearly established. Location by agency is just as good as by person if antecedently authorized or subsequently ratified; and since there was no privity between plaintiff and defendant, nor any principle of estoppel X's discovery inures to the benefit of defendant and ousts plaintiff unless he was in such actual possession as to block X from making a valid location in defendant's behalf.

Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856 (1908). A claim within which the requisite deposit has been discovered will not be rendered invalid by the fact that the discovery shaft is only partly upon that claim and partly upon the adjoining claim.

LAND OFFICE DECISIONS.

"But one discovery of mineral is required to support a mining location under the placer laws whether it be of twenty acres by an individual, or of 160 acres or less by an association of persons." *Union Oil Co.*, 23 L. D. 222 reversed, and *Ferrell v. Hoge*, 19 L. D. 568, overruled. *Union Oil Co.*, 25 L. D. 351 (1897).

A charge that the discovery shaft was sunk on ground of a prior valid subsisting location will not be heard, where in an action on an adverse claim the conflicting ground had already been awarded to the applicant. *Mitchell v. Brovo*, 27 L. D. 40 (1898). See other cases to same effect under chap. XIV, div. II.

D. claim was located in 1879 and patent applied for October 14, 1885. Proceedings were delayed by adverse claim. In 1884 T. claim was located conflicting with, and including the discovery shaft of, D. Application for patent of T. claim was made April 17, 1886, entry July 3, 1886, and patent issued Dec. 20, 1890. When the owners of T. made application for a patent, the owners of D. agreed not to adverse in consideration of a conveyance of the ground in conflict after patent. This conveyance was made. This was held not to work such a loss of discovery as will defeat the entire location of D., it appearing that the owners of D. had been at all times in possession, and said discovery and improvements were not made the basis of the location of T. Quere whether the owners of D. were required to adverse T. *Duxie Lode*, 27 L. D. 88 (1898).

One discovery is a sufficient basis for a placer location of 160 acres by an association. "But if it is shown that any area amounting to a legal subdivision does not contain, or is not valuable for, the deposit for which the location was made, it is competent for this to be shown by the protestants." The burden of proof is on the latter. *Ferrell v. Hoge*, 27 L. D. 129 (1898).

While a single discovery is sufficient to authorize the location of a placer claim, and may, in the absence of any claim or evidence to the contrary, be

treated as sufficiently establishing the mineral character of the entire tract to justify the patenting thereof, such "discovery does not conclusively establish the mineral character of all the land included in the claim, so as to preclude further inquiry in respect thereto." Where a part of the ground included in a placer entry, in this case 20 acres, is shown to contain no valuable mineral deposits, it will be excluded from the entry. *Ferrell v. Hoge*, 29 L. D. 12 (1899).

Entry will be allowed of two overlapping claims, located and held by the same party and resting on separate discoveries of parallel veins, although the discovery in the junior location was made within the limits of the senior location where the overlap is excluded from the survey of the latter. The later location will be treated as an abandonment of the earlier to the extent of the overlap. The rule that a location based on a discovery within the limits of a prior existing valid location is void is not applicable where both locations are made by the same person. *Golden Link Min. Leasing & Bonding Co.*, 29 L. D. 384 (1899).

A location cannot be based on a discovery on the dip of a vein whose apex lies within the lines of a prior claim. The land department has jurisdiction to determine whether a discovery has been made on the dip or the apex of a vein, when that question is raised by protest to an application for patent. *Bunker Hill, etc., Co. v. Shoshone Min. Co.*, 33 L. D. 142 (1904).

Discovery is indispensable to the validity of a mining location, and necessarily must proceed or be coincident with the perfection thereof. The right to a patent must always rest upon the basis of a lawful location, and if the element of discovery be drawn in question so as to involve the rights of possession between rightful claimants, the department cannot ignore the alleged absence of discovery by the applicant. Ordinarily, the question is one to be tried by a court of competent jurisdiction upon an adverse claim. Where, however, the question cannot be raised in that way, the land department will entertain a protest and take jurisdiction to determine it. *Rupp v. Heirs of Healey*, 38 L. D. 387 (1910).

II. LENGTH OF TIME ALLOWED AFTER DISCOVERY TO PERFORM ACTS OF LOCATION.

p. 222. In addition to the statutes cited in vol. 1, p. 223, n. 1, see Arizona Rev. St. 1901, §§ 3234, 3244; Idaho Civ. Code, § 2556; Montana Laws of 1907, p. 18; Nevada St. of 1907, p. 419; North Dakota Pol. Code, § 1807; Oregon, 2 B. & C. Ann. Codes, § 3975; South Dakota Pol. Code, § 2539.

Colorado.

Sierra Blanca Min. & Reduction Co. v. Winchell, 35 Colo. 13, 83 Pac. 628 (1905). Mill's Ann. St. §§ 3152-4-5, provide that within sixty days from the time of making discovery a shaft ten feet deep shall be sunk; or an

open cut, crosscut or tunnel which shall cut the lode at a depth of ten feet below the surface; or an adit at least 10 feet along the lode from the point where the lode may be in any manner discovered. § 3162 provides for the same thing in relocating abandoned claims, or that the locator may sink the original discovery shaft ten feet deeper.

A notice properly made and posted upon a valid discovery of mineral is an appropriation of the territory therein described for a period of 60 days, and during this period no one can initiate title thereto which would be rendered valid by the mere failure of the first appropriator to perform the necessary discovery work within the time prescribed by law.

Ingemarson v. Coffey, 41 Colo. 407, 92 Pac. 908 (1907). (1) The sixty days prescribed by the statute runs from the date of discovery and posting the discovery notice, and cannot be extended by changing the date in the notice or renewing the notice. (2) Where a lode had been located and abandoned by persons who had driven an adit on the lode, which, after abandonment, had caved in and was filled with earth, and a subsequent locator placed his discovery notice on the lode near the adit, and did some work in the old adit, picking it on the vein about 472 feet, and made a new face about 12 feet high, such work was not in compliance with either of the above statutes.

Montana.

Sanders v. Noble, 22 Mont. 110, 53 Pac. 1037 (1899). U. S. Rev. St. 2324, requiring the location to be distinctly marked on the ground, does not require that this be done immediately. Therefore, §§ 3611-3612, Pol. Code of Montana, giving a locator 90 days from the time of posting a notice of his location in which to define the boundaries of his claim and to record the location, is not in conflict with the act of Congress. Under the statutes of Montana in question a locator may, if in good faith, at any time before the expiration of the 90 days, use his discovery post as a pivot and move his lines in any direction, notwithstanding intervening locations by other persons. Hunt, J.: "If the questions which we have discussed were *res integra*, we should be disposed to take a view of the federal statute (section 2324) differing from the rule of *Erhardt v. Board*, *supra*, and to agree with the California and Oregon cases cited, which interpret the law as requiring an immediate marking of the location on the ground, so that the boundaries can be readily traced, or that a *possessio pedis* be had until they can be so marked within a reasonable time. There is a great deal to be said in support of the argument that Congress never meant to allow the discoverer to stop his work, leave his claim, and postpone marking his boundaries for any period of time. The effect of the present construction is to give advantages to the discoverer beyond what the statute seems to fairly contemplate; and yet, if the right to postpone the marking of the boundaries for 90 days exists, there is no escape from the conclusion that the right to swing in good faith during that time goes with it. This is so because the reason for allowing the right to postpone is to definitely ascer-

tain the strike, so that the discoverer may secure the benefit of his location before marking. Therefore, where the discoverer gives, as he must under the State statute, the general course of his vein in his discovery notice, and, notwithstanding those courses, he can postpone marking the ground for 90 days thereafter, so that the boundaries of his claim may be traced, it should necessarily follow that, if the course given in the notice posted is not the true course of the lode as ascertained, he may swing his claim so as to include within his boundaries ground that was not embraced in the notice of discovery, provided it includes the true course of the vein claimed. This right to postpone thus gives a discoverer a circle to move his claim in until he marks its boundaries, the radius of the circle being ordinarily a distance equal to the longest distance claimed from the point of discovery. This, for a time, practically withdraws a large area from the public domain, and compels prospectors to abide the time when the discoverer of a vein may elect to mark his ground. We doubt if Congress ever intended such a consequence. The question, however, involves federal laws and statutes complementary of federal laws; so we feel bound by the interpretations of the United States courts, hence dismiss the subject with the foregoing observations of our own."

Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869 (1899). Under Comp. St. div. 5, § 1477, which allowed 20 days in which to complete a location and make the necessary record, a person who posted his notice in good faith, in plain view, with the intention to complete his location within the prescribed 20 days, after prospecting sufficiently to enable him to determine the course or strike of the vein, thereby acquired a right to all the ground legitimately covered by his notice, to the exclusion of any other person endeavoring to locate any part of it by means of a junior discovery, even though the latter person recorded such junior discovery and location within the 20 days.

Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034 (1906). The provision of § 3611, Pol. Code of Montana, that the locator must sink a shaft on the lode to the depth of at least ten feet from the lowest part of the rim at the surface, or deeper, if necessary to show a well defined crevice or valuable deposit, within ninety days of discovery, is mandatory and must be substantially followed in order that the locator may acquire any right under his location. (This subject is now governed by Montana Laws of 1907, p. 22, where it is provided that the period of time prescribed for the performance of any act in connection with the location of mining claims shall not be deemed mandatory where the act is performed before the rights of third parties have intervened.)

Oregon.

Crown Point Min. Co. v. Crismon, 39 Or. 364, 65 Pac. 87 (1901). The failure of the locators of a mining claim to mark its boundaries on the ground within six months after the posting of the discovery notice cannot be taken advantage of by a subsequent locator who did not make his lo-

cation until after the prior locators had marked the boundaries of their claim on the ground.

Utah.

Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019 (1901). See this case on pages 278 and 288.

Washington.

Union Min. & Mill. Co. v. Lettich, 24 Wash. 585, 64 Pac. 829, 85 Am. St. Rep. 961 (1901). The United States statutes do not limit any time within which the discoverers of a vein must mark the boundaries of their claim so that the same may be readily traced upon the ground, and in the absence of state legislation or local regulation of this matter, a person who discovers a vein, erects a monument at the point of discovery, and posts thereon a notice claiming the statutory number of feet in a given direction, is entitled to a reasonable time thereafter to mark his boundaries so that the same may be readily traced on the ground. Where the discoverers became short of provisions and had to leave the place of discovery to obtain them, eight days was held by the court to be a reasonable time for the marking of the boundaries. The court disapproves the decisions of *Newbill v. Thurston*, 65 Cal. 419, 4 Pac. 400, vol. 1. p. 230, and *Patterson v. Tarbell*, 26 Or. 29, 37 Pac. 76, vol. 1, p. 226.

III. LOCATION OF CLAIMS.

p. 227. The only act of location which is prescribed by congress is the marking thereof on the ground. Subject to this requirement, the miners of any mining district may make any regulations governing the location which do not conflict with the laws of the United States or with the laws of the state or territory in which the district is situated. Rev. St. 2324. This statutory provision is held to authorize legislation by the states and territories governing the location of mining claims upon the public lands situated within their boundaries. The acts prescribed by such legislation, as well as the miner's regulations, therefore, become essential parts of the location which is not completed until they are performed.

Although there may be a logical, or even a prescribed, order in which the series of acts constituting location should be done, it is not essential that they should be performed in this or in any particular order. It is sufficient if they are all performed before any intervening adverse rights accrue.

United States.

Perigo v. Erwin, 85 Fed. 904 (1898). C. C. D. Utah. "Before the discovery of a vein on the unappropriated public land of the United States, there can be no location. But the order in which the acts requisite to a location are done is immaterial, provided they are completed before the rights of other parties intervene."

Walton v. Wild Goose Min. & Trading Co., 60 C. C. A. 155, 123 Fed. 209 (1903). 9th Circ. "Under the laws of the United States, the requisites of a valid location of placer mining claims are: First. The ground sought to be located must be vacant, unappropriated mineral land belonging to the government of the United States. Second. The location must be marked on the ground so that its boundaries can be readily traced. Third. Discovery of mineral in the ground." "It is not necessary that the acts requisite to perfect a mineral location be performed in any particular order; it is sufficient if they are all performed before any subsequent location is made."

Butte City Water Co. v. Baker, 196 U. S. 119, 49 Law. Ed. 409 (1905). By the constitution the power is conferred on the congress to dispose of the public lands and to determine the conditions upon which they shall be disposed of. Having prescribed the main and substantial conditions of disposal, it may entrust the determination of minor and subordinate regulations to the inhabitants of the mining district or state in which the particular lands are situated. Such power is delegated to the body of miners in the several mining districts by Rev. St. 2319. While there is no direct grant of authority to the states to legislate respecting locations, yet there is a clear recognition of such legislation in Rev. St. 2319, 2322, 2324, 2338 and 2339. Nearly all of the mining states have passed statutes prescribing additional regulations in respect to the location of mining claims, the validity of which has been recognized in many cases. This question must therefore be considered as settled, and the requirements imposed on locations by state legislation must be complied with.

Creede & Cripple Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 49 Law. Ed. 501 (1905). "Location is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locator. For this the only requirement made by Congress is the marking on the surface of the boundaries of the claim. By section 2324, however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the State or Territory within which the district is situated. This is held to authorize legislation by the State. Thus in *Belk v. Meagher*, 104 U. S. 279, 284, 26 Law. Ed. 735, it was said:

'A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations.'

In *Kendall v. San Juan Min. Co.*, 144 U. S. 658, 664, 36 Law. Ed. 583, is this language:

'Section 2324 of the Revised Statutes makes the manner of locating mining claims and recording them subject to the laws of the State or Territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States.'

"Returning now to the matter of location, the Colorado statutes in substance require:

'1. To place at the point of discovery, on the surface, a notice containing the name of the lode, the name of the locator and the date of the discovery.

'2. Within sixty days from the discovery, to sink a discovery shaft ten feet deep showing a well-defined crevice.

'3. To mark the surface boundaries by six posts, one at each corner and one at the center of each side line, hewed or marked on the side or sides in towards the claim.

'4. The disclosure of the lode in an open cut, cross cut or tunnel suffices instead of a ten-foot shaft.

'5. Within three months from date of discovery he must file a location certificate with the county recorder giving a proper description of the claim, and containing also the name of the lode, the name of the locator, the date of the location, the number of feet in length on each side of the center of the discovery shaft and the general course of the lode.' *Morrison's Mining Rights*, 11th ed., p. 59.

The issue of a patent for a lode claim in Colorado is therefore not only a conclusive adjudication of the fact of the discovery of the mineral vein, but also of compliance with these several provisions of its statutes. The Supreme Court of that State has decided that the order is not essential, providing no intervening rights have accrued."

Alaska.

Heman v. Griffith, 1 Alaska, 264 (1901). The order of events in the location of a mining claim is immaterial. If it appears that each act required by statute has been performed, and the claimant is in possession thereunder prior to any intervening rights, the claim will be sustained.

Barnette v. Freeman, 2 Alaska, 286 (1904). See this case on page 271.

Redden v. Harlan, 2 Alaska, 402 (1905). See this case on page 271.

Bulette v. Dodge, 2 Alaska, 427 (1905). "While marking, recording and discovery are each necessary to the creation of a valid placer claim, it is not material in what order they are performed. No claim, however, is perfected until discovery, and, as a general rule, if after A. has marked and recorded, B. marks, records and discovers mineral, the claim is B's."

"Three acts must necessarily concur to bring into existence a valid placer mining location: First, there must be such a marking of the bound-

aries of the claim by stakes or other permanent monuments that they can be readily traced; second, a notice of the location, describing the claim with reasonable certainty, must be filed and recorded in the precinct where the claim lies within ninety days from the date of the discovery of the claim; and third, a discovery of mineral must be made within the limits of the claim. When these three acts are completed, and not before, the claim is perfected, provided other rights have not intervened."

Marking the boundaries and recording, without any attempt to find mineral on the claim, or without discovery, would be justly treated as a mere speculative proceeding and would not of itself initiate any right.

California.

Daggett v. Yreka Min. & Mill. Co., 149 Cal. 357, 86 Pac. 968 (1906). The validity of a mining location depends upon a substantial compliance by the locator with the requirements of the act of congress, discovery of a vein, marking the location so that the surface boundaries can be readily traced, and, if the locator would acquire any extralateral rights on the dip of the vein, making the end lines of the location parallel. Posting or recording of notice of location is not required by act of congress, and, in the absence of local laws requiring it, such notices, if posted, have no legal effect or value except as evidence as to the boundaries, provided there are witnesses who saw the monuments placed or standing.

Colorado.

Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015 (1906). The general rule is that the order in which the various steps requisite to make a valid location of a mining claim are taken is immaterial, provided they are completed before the rights of third parties intervene.

Montana.

Mares v. Dillon, 30 Mont. 117, 75 Pac. 963 (1904). The statutes of Montana (Pol. Code, § 3610 et seq.), requiring certain acts to be performed by a locator in addition to those prescribed by the acts of congress, are constitutional. They do not violate § 3, art. 4. of the Constitution of the United States.

Oregon.

Wright v. Lyons, 45 Or. 167, 77 Pac. 81 (1904). The state may prescribe any reasonable regulations in addition to the federal requirements. The requirements contained in B. & C. Comp. §§ 3975-77. are reasonable. They provide for the posting of notice and its contents, the marking of boundaries by monuments of prescribed size, the recording within 60 days of a copy of the notice and an affidavit that a discovery shaft has been sunk 10 feet or equivalent discovery work done. Compliance with these requirements is

essential to the validity of a location. It is a condition precedent to the completion of a valid location.

Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791 (1906). Statutes prescribing the conditions to be performed to properly locate a mining claim are designed as guides only, to determine the rights of conflicting claimants, thus permitting the proper marking of a location or discovery of mineral at any time before adverse rights attach.

Only adverse claimants under a subsequent notice or notices can question the sufficiency of a location.

Utah.

Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019 (1901). The right of a state to pass acts supplementing the act of congress in respect to the location of mining claims is recognized by Rev. St. 2324. The locator must therefore comply with the requirements of Rev. St. Utah, § 1496, that at the time of making discovery he must erect a monument at the place of discovery and post his notice thereon; and of § 1497 that he must mark his boundaries within thirty days from the date of discovery.

"A mining location is not perfected until all of the essential statutory requirements are performed. A locator of a mining claim only acquires exclusive right to the possession of the claim when all of the necessary requirements of a valid location are observed, and if he neglects to perform any necessary requirement within the time prescribed by statute his attempted location is of no avail as against an intervening location peaceably and regularly made and covering the same ground, although he shall have performed the neglected requirements after the inception of the second location." See this case also on page 278.

A. Marking the Location on the Ground.

p. 227. The supreme court of the United States has decided in *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 46 Law. Ed. 331, that a location of a placer claim may be distinctly marked on the ground by the mere posting of a location notice, provided its contents are a sufficient guide to the ready tracing of the boundaries. In the absence, therefore, of state or local regulation, no marking of corners or of lines, nor any physical indication beyond the posting of such a notice, is essential to the location of such a claim. A notice which identifies the claim with a government subdivision is therefore sufficient without the accompaniment of physical designation. In Arkansas, the application of this doctrine is confined to cases where, as was the case in *McKinley Creek M. Co. v. Alaska United M. Co.*, the notice

contains a description identifying the claim with reference to some natural object or permanent monument.

The sufficiency of the marking of the claim being a question of fact and for the jury, it follows that the question whether or not the contents of a notice posted on a placer claim are such as to enable the boundaries to be traced is likewise one of fact, and referable to that tribunal.

There does not seem to be any disposition on the part of the courts to apply the rule in the McKinley Creek case to lode claims.

On the other hand, where the claim has been marked by physical monuments, it is not necessary in the absence of a local statutory requirement that these be described in the posted notice. Indeed, the visible monuments control the description contained in the notice, if the claim marked by the former is substantially the same as that described in the latter.

When the land is relocated, the relocater may adopt posts and stakes which he finds upon the ground erected by others if they are sufficient; or if they are insufficient, he may repair or restore them.

In regard to the right to change boundary lines, after they have been marked, so as to take in new territory, see "Amendment of the Record" on page 315, below.

In addition to statutes cited in vol. 1, p. 228, n. 1, see Arizona Rev. St. 1901, §§ 3232, 3236, 3242, 3243; Idaho Civ. Code, §§ 2557, 2563; Montana Laws of 1907, p. 18; Nevada St. of 1907, p. 419, Comp. Laws, § 220; New Mexico, Laws of 1899, c. 57, p. 111; North Dakota Pol. Code, § 1805; Oregon, 2 B. & C. Ann. Codes, § 3975; South Dakota Pol. Code, § 2537; Washington 3 Bal. Ann. Codes, § 3151a; Wyoming Rev. St. 1899, §§ 2548, 2553. And see, also, present L. O. Regs. par. 10.

United States.

Del Monte Min. & M. Co. v. Last Chance Min. & M. Co., 171 U. S. 55, 43 Law. Ed. 72 (1898). Brewer, J.: "Congress has not prescribed how the location shall be made. It has simply provided that it 'must be distinctly marked on the ground so that its boundaries can be readily traced,' leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such location shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes

shall be placed along the sides and ends of the location, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground, are not always made by experienced surveyors. Indeed, as a rule, it has been and was to be expected that such locations and markings would be made by the miners themselves—men inexperienced in the matter of surveying, and so in the nature of things there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities, the posts, stakes or other particular marks required by the rules and regulations of the mining district may be placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken, such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of the existence of any prior claim. And in all places posts, stakes or other monuments, although sufficient at first and clearly visible, may be destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered naturally many locators hurry to seek by early locations to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that around any new discovery there quickly grows up what is called a mining camp, and the contiguous territory is prospected and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made, and indeed, in every mining camp where large discoveries have been made locations, in fact, overlap each other again and again. *McEvoy v. Hyman*, 25 Fed. 596, 600. This confusion and conflict is something which must have been expected, foreseen—something which in the nature of things would happen, and the legislation of Congress must be interpreted in the light of such foreseen contingencies.”

Perigo v. Erwin, 85 Fed. 904 (1898). C. C. D. Utah. The fact that one of the stakes of a location was placed upon an adjoining patented claim, a portion of which was included in the lines of the location, does not invalidate the location, when the evidence clearly shows that the locator only intended to claim that portion of the premises not in conflict.

“While the mining laws of the United States require that a location shall be so marked on the ground that its boundaries can be readily traced, they do not provide for a maintenance of such marking. If a location be once validly made, the stakes marking it may disappear and nothing be left to identify the ground to any one other than the locator without invalidating the claim. If thereafter another qualified locator bases a location on a discovery of a vein without the first claim, not then subject to relocation, he gains no right, because he has discovered no vein on the land of the United States open to exploration; but if, having discovered a vein on the lands so open to exploration, he unwittingly places one or more of

his stakes on the land already claimed, there seems no reason to avoid his claim to the unappropriated land by reason of the mistake."

Smith v. Newell, 86 Fed. 56 (1898). C. C. D. Utah. A claim, in shape approximately a parallelogram, was marked by placing at each corner substantial stakes, 4 feet high and 4 inches in diameter. Similar stakes were placed at the point of discovery and on the side lines. The location notice was on the discovery stake and upon a tree. This was held to be a sufficient marking. It is not necessary that the stakes should be marked with the name of the claim. Having been once so marked, the right of the locator would not be affected by the obliteration of the marks or the removal of the notice without his fault.

Ledoux v. Forester, 94 Fed. 600 (1899). C. C. D. Wash. "The law is equally mandatory in requiring that mining claims must be so marked upon the ground that the boundaries thereof can be readily traced. This requirement is not fulfilled by simply setting a post at or near the place of discovery, and setting stakes at each of the corners of the claim and at the center of the end lines, unless the topography of the ground is such that a person accustomed to tracing the lines of mining claims can, after reading the description of the claim in the posted notice of location, by a reasonable and bona fide effort to do so, find all the the stakes, and thereby trace the lines. Where the country is broken, and the view from one corner to another is obstructed by intervening gulches and timber and brush, it is necessary to blaze the trees along the lines, or cut away the brush, or set more stakes at such distances that they may be seen from one to another, or dig up the ground in a way to indicate the lines so that the boundaries may be readily traced. The least that can be required of locators is that the corner stakes shall not be so far apart as to include an area considerably greater than the size of the claim as described in the posted notice, or greater than the law allows to be included in a single claim."

Walsh v. Ericin, 115 Fed. 531 (1902). C. C. D. Cal. There is a sufficient compliance with Rev. St. 2324, requiring that the location of a mining claim be distinctly marked on the ground, so that its boundaries can be readily traced, where a notice of location is posted on a blazed tree standing upon one of the boundary lines, and three corner stakes are placed at stated distances from the notice and from each other, although, for an unexplained reason, there is no stake at the fourth corner, the distance of the lines leading to and from which, however, are stated accurately. "A surveyor would certainly be enabled without difficulty to ascertain the exact limits of the location, and a prospector could easily ascertain the lines of the ground staked off." Where the boundaries of a claim have been marked properly the rights of the locator are not divested by the removal or obliteration of the stakes, monuments, marks or notices without his act or fault.

McKinley Creek Min. Co. v. Alaska United Min. Co., 183 U. S. 563, 46 Law. Ed. 331 (1902). It was objected that plaintiffs' locations were invalid because they were not distinctly marked on the ground. Location

notices were in evidence, which had been posted on a stump by which location was claimed on "a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley Creek, etc." The notice also stated the distance from certain falls on said creek and the relation of the adjoining claim. "These notices constituted a sufficient location; the creek was identified and between it and the stump there was a definite relation which, combined with the measurements, enabled the boundaries of the claim to be readily traced."

Oregon King Min. Co. v. Brown, 55 C. C. A. 626, 119 Fed. 48 (1902). 9th Circ. "The statute * * * does not say that the boundaries shall be indicated by physical marks or monuments, nor in any particular or designated manner. The requirement is that the location shall be so distinctly marked on the ground as that its boundaries may be readily traced. It has been many times decided that any marking on the ground, whether by stakes, monuments, mounds or written notices, whereby the boundaries of the location can be readily traced, is sufficient." The court quoted *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 46 Law. Ed. 331, and held that it was error to instruct the jury that the lines themselves must be indicated by physical marks and measurements, so that one unfamiliar with surveying and without the aid of measuring instruments could readily see just what was claimed. It was assumed that the sufficiency of the marking was a question for the jury.

Walton v. Wild Goose Min. & Trading Co., 60 C. C. A. 155, 123 Fed. 209 (1903). 9th Circ. Whether there is such a marking of a claim that its boundaries can be readily traced on the ground is a question of fact. "Any marking of the ground claimed by stakes and monuments and written notices whereby the boundaries of the claim can be readily traced is sufficient."

Visible stakes and monuments placed on the ground will control the location of a claim if inconsistent with the measurements and description contained in the location notices, provided the location of the claim is approximately the same in both. The marking may be done by the agents or employes of the locator. The title to the claim is not divested by the obliteration or removal, without the fault of the locator, of the stakes and monuments marking its boundaries, or of the location notice.

Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co., 125 Fed. 408 (1903). C. C. D. Nev. A locator of a mining claim who has properly staked and marked it upon the ground cannot lose his rights thereto by any removal of the posts and monuments by strangers, especially as against a subsequent locator who knew that the prior location had been made and could readily have ascertained the lines of the claim but made no effort to do so.

Charlton v. Kelly, 84 C. C. A. 295, 156 Fed. 433 (1907). 9th Circ. The court had instructed the jury in regard to marking the claim, in part, as follows: "The requirements of the statute in this respect are not necessarily fulfilled by merely setting stakes at each of the corners of the claim and at the center of the end lines, unless the topography of the ground and the surrounding conditions are such that a person accustomed to tracing

lines of mining claims can, after reading a description of the claim in the posted or recorded notice of location or upon the stakes, by a reasonable and bona fide effort to do so, find all of the stakes and thereby readily trace the boundaries. Where the country is broken, or the view from one stake or monument to another is obstructed by intervening timber or brush, it may be necessary to blaze trees along the line, or cut away the brush, or set more stakes at such distances that they may be seen from one to the other, in a way to indicate the lines so that the boundaries can be readily traced." The court further charged that it was not for the court to say but was for the jury to determine whether the marking was sufficient. "We find no error in this instruction. The statute requires that the location must be marked on the ground so that its boundaries can be readily traced. It does not prescribe or define the nature of the marks or the position of the same on the ground. It is universally held that any marking on the ground whereby the boundaries of the claim may be readily traced is sufficient. The instruction so given by the court below recognized this rule. It did not confine the jury to the consideration of stakes or other permanent monuments on the ground and it left to the jury the decision of the question whether, from the evidence in the case and the topography of the ground, a sufficient marking of the boundaries of the claim had been made by the plaintiffs in error so that the same could be readily traced by a person making a reasonable effort to do so."

Alaska.

Moore v. Steelsmith, 1 Alaska, 121 (1901). "If the center line of a location lengthwise of the claim up and down the creek is marked by a stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the claim from stake to stake and a certain specified number of feet in width on each side of the line, such location of the claim is so marked that the boundaries may be readily traced, and, so far as the marking of the location is concerned, is a sufficient compliance with the law."

Loeser v. Gardiner, 1 Alaska, 641 (1902). A record of location which describes the claim as "No. 7 below dis. S. C. M. D.," and as "500 feet up and down stream" in a certain creek, the claim being marked by two center stakes without any specific limitation on the sides or in area, is sufficient. The court will take notice of the fact that "it is a custom among miners in this region, in locating placer mining claims along a cañon, gulch or water course, to do so by numbering them from a discovery claim, as above or below that point." Also that "in addition to locating by number, it is also a general custom * * * to mark the boundaries by an upper and lower center stake, upon one or both of which the miner places his notice of location." The court was therefore "of opinion that the location in question by two center stakes, posted or written notices, and by serial number, is a sufficient marking of the location; that under such circumstances the boundaries of the claim are formed by side lines parallel to

the center line, and by end lines at right angles thereto; that the side lines shall be located equidistant from the center line, and far enough to embrace 20 acres, and no more, in the claim." When a claim is once properly marked on the ground, the locator's rights cannot be divested by the obliteration of the marks or removal of the stakes without his fault, so long as he continues to perform the necessary work upon the ground, and to comply with the law in other respects.

Arkansas.

Worthen v. Sidway, 72 Ark. 215, 79 S. W. 777 (1904). Posting upon a tree a notice in which the locator claims the exclusive right to hold, prospect and mine upon a tract of land described by government subdivision, is not a sufficient marking to effect a valid placer location. The fact that the land has been surveyed and the claim is for the whole of a legal subdivision does not dispense with the requirement of marking the location upon the ground. The court pointed out that the notice did not contain a reference to some natural or permanent monument to identify it, distinguished *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 46 Law. Ed. 331, and followed *White v. Lee*, 78 Cal. 593, 2 Pac. 363, 12 Am. St. Rep. 115. (See vol. 1, p. 231. This case had been overruled, see p. 296, below.)

Malecek v. Tinsley, 73 Ark. 610, 85 S. W. 81 (1905). Where one attempts to make a location by posting a notice on a house, in which he claims to have located a mineral claim on certain lands, but no effort is made to distinctly mark the location on the ground so that its boundaries can be readily traced, and the notice does not contain sufficient description to identify it by reference to some natural or permanent monument, such location is invalid.

Ware v. White, 81 Ark. 220, 108 S. W. 831 (1907). The requirements of Rev. St. 2324, that the claim be distinctly marked on the ground so that its boundaries can be readily traced and that the recorded certificate describe the claim with reference to some natural object or permanent monument by which it can be identified, are mandatory.

California.

Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841 (1896). Where a stake three or four inches in diameter and four or five feet high in a mound of rocks is erected at each end of the center line and at each corner of the claim and a notice containing a description is posted in conspicuous places, the location has been distinctly marked so that its boundaries can be readily traced within the requirement of Rev. St. 2324.

Willeford v. Bell, 49 Pac. 6 (1897). "The law requires this marking of the claim upon the ground to be done in such a manner that any person of reasonable intelligence may go upon the ground and readily trace the claim out, and readily find the boundaries and limits of the claim without instructions, advice, or information from any one or thing other than the

marking upon the ground, and it is not necessary or required that such person shall have a copy of the notice of location or necessarily use it in tracing the boundaries of the claim, but where such notice is posted upon the claim, and constitutes a part of the marking of such claim upon the ground, it may be used as a part of the means by which the boundaries of the claim can be traced."

McCann v. McMillan, 129 Cal. 350, 62 Pac. 31 (1900). The provision of Rev. St. 2324 that "the location must be marked on the ground, so that its boundaries can be readily traced," does not require that the recorded notice contain a statement that the claim is so marked.

Conway v. Hart, 129 Cal. 480, 62 Pac. 44 (1900). Reference to and use of stakes standing on the ground, which had been put in by the locators on a former occasion, is a sufficient compliance with the requirement of Rev. St. 2324 that "the location must be distinctly marked on the ground so that its boundaries can be readily traced." It is not necessary to put in new stakes.

Eaton v. Norris, 131 Cal. 561, 63 Pac. 856 (1900). A locator of two adjoining claims complies sufficiently with the requirement that the location must be distinctly marked on the ground, so that its boundaries can be readily traced, where he marks the corners of each claim by stakes, two of which are at the ends of the dividing line, and common to both claims, some of the stakes being in the brush and some in the open, blazes two sides of an oak tree in the middle of the dividing line, and posts notices of location thereon, and develops the ledge on both claims so as to show its existence and direction.

Whether the marks made by a locator are of such a character that the boundaries can be readily traced is a question for the jury.

Yreka Min. & Mill. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091 (1901). Where there was a location notice definitely describing the boundaries of a claim, and six years after this notice was recorded enough monuments were found corresponding with those mentioned in the notice to enable the boundaries to be traced, the jury is justified in finding that the locators originally marked the boundaries so that they might be readily traced, particularly where the adverse claimant admitted his knowledge of the location and based his claim on an alleged abandonment.

Temescal Oil Min. & Development Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010 (1902). There is a sufficient compliance with the requirement of Rev. St. 2324, that the location be distinctly marked on the ground so that its boundaries can be readily traced, where the location is, and is described in the notice of location as being, coincident with a government subdivision, one of the monuments of which was standing when the claim was located, and the lines of the government subdivision were run by the locator and its corners marked by stakes.

Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 1111, 3 L. R. A. (N. S.) 993 (1903). The locators of a placer claim posted a notice thereon claiming a quarter section as placer mining ground. They then caused a survey to be made in order to conform the boundaries of their claim to the quarter sec-

tion. They set stakes at each corner thereof, marked "N. E. Corner Section 32," etc., and set some laths to mark the east line of the claim. The stakes, however, were not placed exactly at the true corners of the quarter section, so that there was a strip of land in the quarter section which was not embodied in the claim as thus marked. Held that another person could not locate a claim on this strip. The notice and stakes showed plainly that the original locators claimed the entire quarter section. "The United States had surveyed and marked the quarter section by monuments, and an unintentional mistake in retracing the lines should not be held to be a waiver by the locators of the claim to the whole quarter section." All that is necessary is that a third person, intending to locate, can readily ascertain from what has been done by the prior locator the extent and boundaries of the claim so located. "The notice in this case stated to the world that the northeast quarter of section 32 had been located as a placer claim. The notice did not have to further state the boundaries of the quarter section, nor did the locator have to place stakes or marks upon the ground to show any one the lines of the quarter section." (*White v. Lee*, 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115, vol. 1, p. 231, overruled.)

McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823 (1907). The fact that in marking the boundaries of a lode claim the corner monuments are placed on ground already appropriated does not affect the validity of the location as to ground within the limits of the boundaries, which is unappropriated and open to location.

Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540 (1909). A locator of a claim, the dimensions of which were 600 feet by 1,500 feet, posted a notice designating the place of posting as the starting point and giving calls and distances to stakes at the four corners. The stakes thus called for were set, and in some instances stones piled around them. This was held to be a sufficient marking of the claim within the requirements of the statute.

Colorado.

Taylor v. Parenteau, 23 Colo. 369, 48 Pac. 505 (1897). M. A. S. 3153 provides, "Where it is practically impossible on account of bed rock to sink such posts, they may be placed in a pile of stones, and where in marking the surface boundaries of a claim any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate its proper place." There was no evidence in the case that it was impracticable to place a post or stake at the corner, but if there had been, the cutting of a letter into the solid rock, either at the corner or at a distance therefrom, is not equivalent to planting a post in a pile of stones.

Benton v. Hopkins, 31 Colo. 518, 74 Pac. 891 (1903). A locator may change the boundaries of his claim as marked upon the surface only when such change does not injuriously affect intervening rights.

Montana.

Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869 (1899). See this case on page 310.

Oregon.

Wright v. Lyons, 45 Or. 167, 77 Pac. 81 (1904). The omission in marking a location, to establish the center end posts and monuments, as required by the Oregon statute, is fatal to the validity of the location.

These statutes are not repugnant to the mining laws of congress and are valid and binding upon the locator if he would secure a good location. The federal legislation permits state and local laws and rules regulating the location of mining claims, the only limitation prescribed being that they shall not conflict with the paramount law providing for disposal of the public mineral domain to purchasers.

South Dakota.

McPherson v. Julius, 17 S. D. 98, 95 N. W. 428 (1903). In an action to quiet title to a mining claim, the fact that the plaintiffs, in locating the claim, did not firmly set one of the stakes in the ground, as required by § 2002, Comp. Laws, but only fastened it to a tree by small twigs, is immaterial, when it appears that the claim was properly staked before the defendants' location was completed.

Utah.

Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832, 77 Am. St. Rep. 913 (1899). Whether or not a claim is marked on the ground so that it can be readily traced is a question of fact, to be determined by proof aliunde, and the manner of marking it is not required to be stated in the location notice.

Bonanza Consol. Min. Co. v. Golden Head Min. Co., 29 Utah, 159, 80 Pac. 736 (1905). See this case on page 313.

Brockbank v. Albion Min. Co., 29 Utah, 367, 81 Pac. 863 (1905). Where a claim is a relocation of one covering the same ground, the corners of which are still substantially in place, it is sufficient if within a reasonable time after posting the notice of location, which contains a full description of the claim by courses and distances from the discovery monument, the location is perfected by repairing the old monuments and marking the boundaries which conform to the description. The locator, however, delays at his peril since he thereby assumes the risk of intervening rights of third parties.

B. Notice of Location; Posting of Notice.

p. 234. While the posting of a location notice has no place in the scheme of the mineral land law of the United States, yet in

view of the decision in *McKinley Creek M. Co. v. Alaska United M. Co.* (see page 288, above) it may, even where not required by local or state regulation, become of the first importance. Since it may, if its contents are sufficient, constitute a marking of the location on the ground, it may in itself constitute the location of a claim. "These notices," said Justice McKenna, in that case, "constituted a sufficient location."

When a posted notice is prescribed as one of the steps of location, a substantial compliance with the requirements of the law or regulation is all that the law exacts. The notice itself, in turn, is to be construed liberally and not with the strictness which is applied in the construction of conveyances of real estate.

In addition to statutes cited in vol. 1, p. 235, n. 1, see Arizona Rev. St. 1901, §§ 3232, 3242; Idaho Civ. Code, §§ 2556, 2563; Montana Laws of 1907, p. 18; Nevada St. of 1908, p. 419, Comp. Laws, § 220; New Mexico Comp. Laws of 1897, § 2286; Oregon, 2 B. & C. Ann. Codes, § 3975; South Dakota Pol. Code, § 2536; Utah Laws of 1899, p. 26; Washington 3 Bal. Ann. Codes, § 3151a; Wyoming Rev. St. 1899, §§ 2548, 2553. By Nevada St. of 1907, p. 373, it is made a felony to antedate or falsely date any notice of location.

United States.

Perigo v. Erwin, 85 Fed. 904 (1898). C. C. D. Utah. The United States laws do not require any notice of location to be either posted or recorded, and, where there is no evidence of any regulation of miners requiring it, it is unnecessary.

Walton v. Wild Goose Min. & Trading Co., 60 C. C. A. 155, 123 Fed. 209 (1903). 9th Circ. The court will construe with great liberality notices which are required to be posted upon ground claimed as a location. "Notices of location of mining claims in remote settlements and in new mining districts are seldom drawn with perfect accuracy. The courses and directions cannot readily be ascertained, because the wandering prospector does not always carry a pocket compass, nor is he often accompanied by a surveyor who could with his instruments correctly give the metes and bounds." Mistakes as to direction, courses and distances are to be controlled by the monuments on the ground or references to other well known objects or locations.

Zerres v. Vanina, 134 Fed. 610 (1905). C. C. D. Nev. Section 208, Comp. Laws Nev. 1900, prescribes, as to the contents of a location notice, among other things: "Fourth. The number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the

width on each side of the center of the vein, and the general course of the vein or lode as near as may be." An omission to give the distance on each side of the discovery point and the general course of the vein is not in itself fatal. A literal and strict compliance with the law in these respects is not demanded. A liberal construction should be given to the language used by miners in drafting their notices of location, and a substantial compliance with the law is all that is required.

Yosemite Gold Min. & Mill. Co. v. Emerson, 208 U. S. 25, 52 Law. Ed. 374 (1908), affirming 149 Cal. 50, 85 Pac. 122. "The object of posting the preliminary notice of the claim is to make known the purpose of the discoverer to claim title to the extent described and to warn others of the prior appropriation." One who had all the knowledge as to the location and boundaries of the claim which any notice could have given him, and undertook to locate a new claim precisely within the boundaries of the old one, seeking to take advantage of a failure to comply with the requirement as to the amount of annual work to be done, cannot claim a forfeiture for failure to comply with the local regulations as to the posting of notices.

Arizona.

Wiltsee v. King of Arizona Min. & Mill. Co., 7 Ariz. 95, 60 Pac. 896 (1900). Location notices are liberally construed by the courts. "There is no rule of necessity, such as exists in the construction of a deed, which requires that the term 'easterly' used without qualifying language, shall denote due east and the term 'westerly' shall denote due west. In the sense in which 'easterly' is used by the miner and prospector, the term denotes the general course of a vein or location running nearer towards the east than any of the other cardinal points of the compass. A notice of location, therefore, which gives the course of the location as running westerly so many feet and easterly so many feet from a discovery shaft or point of discovery, until boundaries are definitely located by the erection of monuments, must be held to reserve from entry by subsequent locators the surface area which might be included within any location so made that, were a line drawn lengthwise through the center of said claim from the west center end through the point of discovery to the east center end of said claim, said line would lie at some point between east 45° degrees north, and east 45° south, from the point of discovery. Should, however, the locator, at the time of posting his notice, in addition to giving the general course of his vein, place monuments at the center of each end line, and thus definitely give notice to subsequent locators as to the meaning and intent of the language used in his notice as to the general course of his location, we think, under the law, he is bound by the location thus made and defined, so that he may not thereafter, and during the 90 days permitted for the perfection of his location, change the course of his location to the prejudice of intervening rights."

California.

Willeford v. Bell, 49 Pac. 6 (1897). In the absence of local regulations requiring the posting of notice, one who is proving a location need not produce a copy of a posted notice. Under the statute it is the contents of the recorded notice which he must show which may be done by copy.

Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223 (1906). The mining laws of the United States do not require the notice of location to be posted or recorded, and it is only where the local customs and rules of the district require these steps that they are necessary.

Daggett v. Yreka Mill & Min. Co., 149 Cal. 357, 86 Pac. 968 (1906). See this case on page 287.

Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931 (1909). Location notices should be liberally construed, having reference to the circumstances under which and the character of the parties by whom they are generally made. In the determination of the sufficiency of the notice the most important guide is the purpose of the notice, which is to identify the land claimed with reasonable certainty, and it would seem that the notice is valuable chiefly as a temporary protection to the locator while the other acts are being performed. If a third party, intending to locate, can readily ascertain from what has been done by the prior locator the extent and boundaries of the claim so located, then the object of the statute has been accomplished. Hence a notice which describes a legal subdivision of surveyed land is sufficient without reference to any other natural object or permanent monument.

Colorado.

Treasury Tunnel, Min. & Reduction Co. v. Boss, 32 Colo. 27, 74 Pac. 888, 105 Am. St. Rep. 60 (1903). Under the laws of Colorado (Mills' Ann. St. 3150, 3152), the locator of a lode mining claim must post at the point of discovery a notice containing a statement of certain facts. Afterwards he must, among other things, record a location certificate containing a statement of the same facts. Held that where the locator of a claim posted a notice at the point of discovery invalid because within the limits of a valid subsisting location, and then filed his location certificate, his location became perfect when subsequently, but before intervening rights had attached, he made a valid discovery within the limits of his claim as originally located. It was not necessary for him to post a notice at this latter point, because the location certificate already recorded contained what was intended to be a final and permanent statement of the facts which the statute required to be placed on the discovery notice merely as a temporary means of giving notice to the world that the claim had been located.

Montana.

Butte Northern Copper Co. v. Radmilovich, 39 Mont. 157, 101 Pac. 1078 (1909). The statute requires that the notice shall be posted at the point of

discovery. Where a locator posted his notice elsewhere, but subsequently posted it at the proper place, as against the intervening rights of another locator, his location is postponed to the date on which he posted notice at the point of discovery.

A notice of a location describing the course of a vein as north and south will support a location of a claim along a vein the general course of which is east or west. Substantial compliance with the requirements of the statute as to notice is sufficient.

Nevada.

Fox v. Myers, 29 Nev. 169, 86 Pac. 763 (1906). See this case on page 276.

New Mexico.

Deeney v. Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724 (1902). In New Mexico a preliminary or discovery notice of location of a mining claim is unknown to the law, and a locator, as against a subsequent locator who enters peaceably, must post such a notice as, when a copy thereof is recorded, the record will meet the requirements of § 2324 of the revised Statutes of the United States.

Upton v. Santa Rita Min. Co., 14 N. M. 96, 89 Pac. 275 (1907). The requirement of Comp. Laws New Mexico, § 2286, that a locator of a mining claim shall post a location notice "in some conspicuous place on such location," is supplementary to and consistent with the federal law, and is an essential which must be complied with. The fact, however, that the part of the claim upon which the notice is posted overlaps by mistake or conflicts with a prior claim does not invalidate the location. It is still good, except as to the part in conflict.

LAND OFFICE DECISIONS.

"The general allegation in the protest that notices of location were not posted on the several locations embraced in the claim is without corroboration in the affidavits filed in support thereof. Such notices, presumably required by the local laws or regulations, are among the initial steps in the location of a mining claim, and are at most for a temporary purpose only. While there is no showing on this point in the applicant's proof, still, it is not shown by the protestants to be a matter of material importance in this case. In the absence of such latter showing it must be presumed that the local laws and regulations have been complied with." *Hughes v. Ochsner*, 26 L. D. 540 (1898).

*C. Record of Location Certificate.**(a) Its Nature and Necessity.*

p. 239. The present view is that a recorded certificate of location is evidence only of the fact that it has been made and recorded, and not of any fact stated therein. It is not even prima facie evidence of the statements which it is required to contain unless made so by statute. It is so made by statute in Montana Laws 1907, p. 20, § 2; Nevada St. 1907, p. 419, § 3.

United States.

Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co., 57 C. C. A. 200, 119 Fed. 164 (1902). 8th Cir. Certificates of location are not conclusive evidence of the facts which they recite as against parties who claim the land they describe adversely to their makers. They are competent evidence of the fact that they are made and filed, but as to facts which they recite, they are only ex parte statements of interested parties.

Peters v. Tonopah Min. Co., 120 Fed. 587 (1903). C. C. D. Nev. "The decisions in the state and national courts have uniformly held that no record of the notice of location is necessary unless the laws of the state, or the rules and regulations of the mining district in which the claim is located, require it." Section 208, Cal. Comp. Laws, requires the posting of the location notice, but does not require that such notice be recorded. Section 210 provides for the recording of a location certificate within 90 days from the date of posting the location notice. The certificate of location is distinct from the location notice; the law does not require the latter to be recorded. There being no law or rule requiring the recording of this notice it is wholly immaterial whether it is recorded or not, and an averment that it was recorded is immaterial and need not be answered.

Walton v. Wild Goose Min. & Trading Co., 60 C. C. A. 155, 123 Fed. 209 (1903). 9th Cir. In the absence of evidence that the rules of a mining district in Alaska required the posting, filing or recording of a notice of location, such posting, filing or recording is not necessary to the validity of the location of a mining claim.

Sturtevant v. Vogel, 167 Fed. 448 (1909). 9th Cir. Rev. St. 2324 does not require the recording of a certificate of location. It leaves the subject open to legislation by the states or regulation by the miners. The act of Congress of June 6, 1900 (31 Stat. 327), § 15, c. 786, which requires recorders in Alaska to record certain instruments, including notices of location, contains a proviso that "Notices of location of mining claims shall be filed of record within ninety days from the date of the discovery of the claim described in the notice." This statute permits, but does not require,

the recording of instruments, and does not provide that failure to record shall work a forfeiture of rights thereunder. The recording of a location notice is not, therefore, an essential to a valid location in Alaska.

Alaska.

Locser v. Gardiner, 1 Alaska, 641 (1902). Where no local rules or customs require the recording of a location, no record need be made.

California.

Webb v. Carlon, 148 Cal. 555, 83 Pac. 998, 113 Am. St. Rep. 307 (1906). Defendants made a location in 1899, but, having failed to record, made a relocation on October 20, 1900, and recorded a notice in which the date was given as October 23, 1900. On October 22nd the plaintiffs located. It was held that the date recorded is only prima facie evidence, and where the evidence showed the fact of an earlier location, the actual date controls as against the date in the notice; consequently the defendants' title prevailed.

Mutchmore v. McCarty, 149 Cal. 603, 87 Pac. 85 (1906). The record of a location notice proves nothing except the bare fact that such a notice has been recorded. That it was posted on the claim, that the location was so marked on the ground that its boundaries could be easily traced, that they included the apex of a lode, that the necessary work was done, etc., all these must be proven directly.

Idaho.

Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14 (1908). In Idaho the location notice or certificate, which by statute must be sworn to, is, when recorded, prima facie evidence of all the facts the statute requires it to contain.

Montana.

Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177 (1907). See this case on page 320.

Nevada.

Ford v. Campbell, 29 Nev. 578, 92 Pac. 206 (1907). Under Comp. Laws Nevada, p. 43, § 210, where there is a district recorder whose place of business is well known, the location certificate must be recorded within the mining district with the district recorder as well as with the county recorder.

The recording of a mining claim is not made an essential requisite of a valid location either by the federal statute or by the laws of Nevada. The above statute provides that the locator "shall record his claim" and that "any record * * * which shall not contain all the requirements

named in this section shall be void * * * and any such record shall be prima facie evidence of the facts therein stated." The effect of the failure to comply with the statute is to avoid the record, but not to invalidate the location. The locator by such failure is deprived of the use of the record as prima facie evidence of the facts contained therein, but he is still at liberty to establish by other evidence that he has made a valid location. The recording of a claim, although required by statute, is not a condition of its validity unless the statute so provides.

Oregon.

Payton v. Burns, 41 Or. 430, 69 Pac. 134 (1902). Under Hill's Ann. Laws, § 3831, it is unnecessary to record a notice of the location of a lode claim in an unorganized mining district. The locator need only mark his location distinctly on the ground, so that its boundaries can be readily traced, as required by Rev. St. 2324.

(b) Contents of the Record.

p. 242. In addition to the statutes cited in the notes in vol. 1, pp. 243, 244, see Arizona, Rev. St. 1901, §§ 3234, 3244; Arkansas, Kirby's Dig. §§ 5360-5366; Idaho Civ. Code, §§ 2558, 2563; Montana Laws of 1907, p. 20; Nevada St. of 1907, p. 419, Comp. Laws, § 221; New Mexico Laws of 1899, c. 57, p. 111; North Dakota Pol. Code, § 1902; Oregon, 2 B. & C. Ann. Codes, § 3976; South Dakota Pol. Code, § 2534; Utah Laws of 1899, p. 26; Washington, 3 Bal. Ann. Codes, § 3151a; Wyoming Rev. St. 1899, §§ 2546, 2553.

United States.

Bennett v. Harkrader, 158 U. S. 441, 39 Law. Ed. 1046 (1895). A location certificate filed in Alaska before the passage of the act of May 17, 1884, c. 53, 23 Stat. 24, and in which the description was obviously imperfect, was held to be admissible for the purpose of showing the time when the possession was taken and to point out so far as it did the property which was taken possession of.

The notice described the claims as follows: "200 feet each frontage and running back 1000 feet thence running from a stake on the west bank of Ice Gulch to a similar stake 1000 feet distant near the mouth of Quartz Gulch." The court said: "Conceding the indefiniteness of the description in the certificate, it does not follow that it is absolutely void, for" under *Hammer v. Garfield Min. & Mill. Co.*, 130 U. S. 291, 32 Law. Ed. 964, the provision of the statute means only when such reference can be made.

Smith v. Newell, 86 Fed. 56 (1898). C. C. D. Utah. A description in a record is sufficient, although, erroneous in its courses and distances, if it

will enable a person of ordinary intelligence to distinguish the premises located from the public land open to exploration.

In the case at bar one of the lines given was correct and at least three of the corner stakes were still in place several months after the location of the conflicting claim. "Under these circumstances I am of the opinion that the ground located as the Dutchman could have been ascertained by a person of ordinary intelligence in attempting to apply the description in the record of the claim to the stakes and monuments called for."

Credo Min. & Smelting Co. v. Highland Min. & Mill. Co., 95 Fed. 911 (1899). C. C. D. Wash. Posts from five to seven inches in diameter, firmly planted in the ground at the corners and ends of a mining claim, and standing not less than five feet above the ground, are "permanent monuments" within the meaning of Rev. St. 2324, requiring all records of such claims to contain such a description of the claim by reference to some natural object or permanent monument as will identify the claim, and a recorded notice, which, in addition to a reference to such posts, also gives the general direction and distance of the claim from a lake and a river, is a sufficient compliance with the statute.

Oregon King Min. Co. v. Brown, 55 C. C. A. 626, 119 Fed. 48 (1902). 9th Circ. Under the Oregon Act of October 14, 1898, providing for the posting of a notice of location, and for the recording of a copy of the same, the copy need not be a literal and exact copy of the notice posted, but only a substantial copy.

McIntosh v. Price, 58 C. C. A. 136, 121 Fed. 716 (1903). 9th Circ. The record of a location need not refer to natural objects. The claim is identified sufficiently if reference be made to a permanent monument, such as a stake, or the boundaries of an adjoining claim.

Butte City Water Co. v. Baker, 196 U. S. 119, 49 Law. Ed. 409 (1905), affirming 28 Mont. 222, 72 Pac. 617. The requirement of Montana Codes Annotated, §3612, that the declaratory statement filed in the office of the clerk of the county in which the claim is situated must contain "the dimensions and location of the discovery shaft or its equivalent" and "the location and description of each corner with the markings thereon," is not invalid as being too stringent and in conflict with the liberal purpose manifested by congress in its legislation respecting mining claims.

Smith v. Cascaden, 78 C. C. A. 458, 148 Fed. 792 (1906). 9th Circ. The recorded notice contained this description: "I claim No. 13 A. Below Discovery on Cleary creek, 1320 feet up and down stream and 330 feet each side of center stake." The evidence showed that in Alaska it was customary to call the first discovered placer claim on a gulch or creek "Discovery Claim," and to number the other claims up and down the gulch or creek from that claim; and that in certain localities it was customary to give to side or bench claims the same numbers as the corresponding claims on the creek with the addition of a letter of the alphabet. Held that the above notice was sufficient. Cleary creek is a natural object, and the Discovery Claim is a natural object or permanent monument within the mean-

ing of the statute, and the description in the customary method identifies the claim with reference to these natural objects. Ross, C. J. dissents.

Alaska.

Butler v. Good Enough Min. Co., 1 Alaska, 246 (1901). A description of a claim sufficiently refers to a natural object or permanent monument which refers to the claim as "Number three on Lulu Creek," and ties it to an "initial stake at east end of claim number two." From this tie it is apparent that the claim was a part of a general system of locating claims on Lulu Creek, either above "discovery" or number 1. "This court will take judicial notice of those general methods and rules of locating and marking mines upon the public domain in Alaska that are so widespread and well known and fixed in the mining system as to be familiar to all miners and in all the mining districts. Of these familiar and general rules, one is that the first discovery is generally called and known as the 'discovery' claim, and that, when the same is within a gulch or on a stream, the claims are marked or numbered from discovery claim up or down the gulch or stream. Another is that claims are frequently numbered or marked by reference to one which is so definitely established as to be used by all the miners along the same course as the initial claim, and is so used by other locators as a permanent monument."

Steen v. Wild Goose Min. Co., 1 Alaska, 255 (1901). Where a certificate of location described a claim as "commencing at the upper or north end stake of the claim No. 14, thence running along the bed of the creek 1,500 feet, thence 300 feet east and west from the center stake," but the claim was finally surveyed and staked in the form of a parallelogram, instead of following the sinuosities of the bed of the creek, the certificate will be construed with reference to the actual staking of the claim, and the claim will not be held void as to all the ground more than 300 feet distant from the center of the creek, and no other person can make a valid location upon such ground.

Price v. McIntosh, 1 Alaska, 286 (1901). A placer location is not void for a discrepancy between the courses and distances mentioned in the notice of location and the stakes and monuments set by the locator to mark the boundaries of his claim. Where there is such a conflict, the stakes and monuments must prevail, if they are sufficient to identify the claim.

Arizona.

Providence Gold Min. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641 (1899). A location notice will not be rejected as being vague and indefinite merely because of an improper description of the direction of the closing line, where the location is sufficient in all other particulars, and the proof shows that all of the monuments are upon the ground.

Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723 (1899). A mine referred to by name is a permanent monument within the meaning of Act No. 42, § 1,

Sess. Laws 1895, requiring location notices to set forth "the locality of the claim with reference to some natural object or permanent monument as will identify the claim." Reference to a mine in a location notice casts upon the party attacking the notice the burden of showing that there is no such mine.

Shattuck v. Costello, 8 Ariz. 22, 68 Pac. 529 (1902). "To name mining claims as the boundaries of a location is such a reference to natural objects and permanent monuments as to comply with the statute."

Cunningham v. Pirrung, 9 Ariz. 288, 80 Pac. 329 (1905). Where it is sought to locate upon ground previously located, but abandoned or forfeited, this fact must be set out in the certificate as required by Arizona Rev. St. 3241. See this case on page 372.

Arkansas.

Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87 (1902). A description in a notice of location of a mining claim, which refers to "the N. W. corner of El Williams" as the beginning of the description, is not invalid because the description does not show what is meant by "El Williams." The presumption is that "El Williams" is a well known natural object, until the contrary appears.

California.

McCann v. McMillan, 129 Cal. 350, 62 Pac. 31 (1900). "Notices of location are to be liberally construed," and in the absence of proof that there were natural objects or permanent monuments that would better identify the location of a claim, it is sufficient if the notice of location describes the claim as "bounded on the East by the Handy Mine, and is about one-quarter mile south of Borax road, and about three miles east of the town of Calico."

Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79 (1900). A description in a location notice is sufficient if the exterior boundaries are described and the corners are fixed by reference to permanent stone monuments. Where a preliminary notice of the location of a claim contains the name of the state and county in which the claim is located and the final notice refers to the preliminary notice, but does not itself show in what state or county the claim is, the description nevertheless may be sufficient.

Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55 (1904). Under Stat. 1875-76, p. 853, c. 562, requiring the recording of location notices, a substantial compliance with its provisions is sufficient; and if the description contained in the notice is complete enough to enable one examining it to ascertain therefrom that the land actually claimed was included therein, the statute is satisfied. A description in a location notice will not be held invalid merely because it erroneously omits the last course and distance, for even if this last distance were omitted, a line drawn from the next to the last course to the place of beginning would include all the land claimed

by the locator. Nor will slight errors in courses and distances be held material, which are controlled by the references in the description to natural objects and permanent monuments sufficiently to fully identify the exact boundaries of the claim.

Dwinnell v. Dyer, 145 Cal. 12, 78 Pac. 247, 7 L. R. A. (N. S.) 763 (1904). At the time a certain location was made there was in force a statute (Act of March 27, 1897; St. 1897, p. 214, c. 159) prescribing certain particulars that location notices must contain, and requiring the record of such notices within certain limited periods. The locator of the claim in question failed to comply with these requirements, and therefore his location was invalid, but he otherwise complied with the law, and remained in possession of the claim until an act was passed (Act of February 8, 1900; St. 1900, p. 9, c. 6) repealing the above statute. Held that the claim was thenceforward good, so long as the owner thereof continued to do the necessary assessment work, and that no other person could subsequently make a location thereon.

Colorado.

Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244 (1900). A patented mining claim is sufficient as a natural object or permanent monument to which to tie the starting point of the description in a location certificate.

When a discovery shaft is described in the certificate by reference to a mining peak, and thence a line is run to the middle of one of the end lines, and thence to a corner post set in stones, the locator has, by reference to a natural object and permanent monument, located his claim in exact conformity with the statute.

Carlin v. Freeman, 19 Colo. App. 334, 75 Pac. 26 (1904). A description in a location certificate which ties the claim by course and distance to a patented mining claim is sufficient to comply with the statute.

Mills' Ann. St. § 3162, provides that, in the case of the relocation of abandoned lode claims, "the location certificate may state that the whole or any part of the new location is located as abandoned property." The word "may" is not mandatory, but permissive, and a relocation certificate which does not state that the ground or any part of it was located as abandoned property is not thereby rendered void.

Londonderry Min. Co. v. United Gold Mines Co., 38 Colo. 480, 88 Pac. 455 (1906). Rev. St. 2324 provides that records of mining claims shall contain such a description of the claim by reference to a natural object or permanent monument as will identify it; Mills' Ann. St. § 3151 provides that the location certificate shall contain such a description as shall identify the claim with reasonable certainty. Whether or not there is such a reference as to satisfy the law must necessarily be a question of fact, unless, in the certificate, there is no reference to such an object or monument, or where, if there is, it is so indefinite that it can be told from an inspection of the certificate that the claim cannot be identified thereby. But a reference to an object or monument is not conclusive of compliance with the

law, for evidence is always admissible to prove that the objects or monuments do not exist, or that the reference does not describe the situs of the claim accurately enough to identify it.

Reference can be made to a mining claim as a permanent monument; and the same presumption raised in the case of a patented claim that it is a well known natural object or permanent monument arises in the case of a claim not patented, as the latter may be as well known, as prominent, and as particularly described as the former.

Idaho.

Brown v. Levan, 4 Idaho, 794, 46 Pac. 661 (1896). The recorded notice described the claim as "situate on the north side of N. W. creek, about one-half mile from the Hurt Mines, the direction being Southwest; the W. claim on the North and the K. claim on the South and the G. claim on the East." The Hurt Mines were shown to be four in number and did not all join. The description did not contain such a reference to a natural object or permanent monument as would identify the claim. "Where the description and reference to a natural object or permanent monument is of such a character that a mining engineer could not find the claim from the location notice as is evident in this case, and where it is such that the claim may be floated almost anywhere to suit the ground or to cover ore that may have been since discovered, it is clearly such a notice as cannot furnish a foundation for a valid location."

"The naming of contiguous claims is a requirement of our statute, and was complied with; but the reference to a permanent monument must be such as will enable a skilled engineer at least, to identify the claim without reference to contiguous claims the location of which is uncertain."

Permanent monuments may exist before the location, or may be erected for the purpose of tying the claim to them; but the courses and distances from them to discovery stake or corner stakes or some other object on the ground must be stated with reasonable accuracy.

Clearwater Short-Line R. Co. v. San Garde, 7 Idaho, 108, 61 Pac. 137 (1900). A location notice which fails to give the direction of the initial point, or permanent monument to which it is attempted to tie the location, from the point of discovery, is void under the statutes of Idaho.

Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955 (1902). The description in a location notice is sufficient under U. S. Rev. St. 2324, and Idaho Rev. St. 3102, which describes the claim as located a certain number of feet from another mine, giving the direction. A mine is a natural object or permanent monument within the meaning of those terms as used in the statutes. A description is sufficient wherein it is stated that the locators "have located 600 linear feet along this lode or vein of quartz, by 300 feet on each side of the middle of the vein or lode, making 600 feet in length. This claim so located is named the 'Bullion Mine', and is situated in French Mining District, Owyhee County, Idaho Territory, and is described as follows: Commencing at this stake and notice, which is situated about 300 feet in

a northwesterly direction from the Minnesota mine—this is an extension of the Red Jacket mine; and running thence along the vein or lode in a southerly direction to similar stake and notice. We, the undersigned, claim 600 linear feet in a southerly direction from this stake and notice to a similar stake and notice. This claim is 600 linear feet long.” It is only where the location certificate fails to make reference to natural objects or permanent monuments sufficient to identify the claim that a court may reject it on that ground.

Where it is shown that a claim has been located in good faith, if by any reasonable construction the language used in the notice in the description and in referring to natural objects and permanent monuments will impart notice to a subsequent locator, it is sufficient. A liberal construction should be given to descriptions of claims and references to natural objects in location certificates.

Bismark Mountains Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14 (1908). Section 2324, Rev. St. U. S., and § 3102, Rev. St. Idaho, require notices of locations to contain such a description of the locality of the claim by reference to natural landmarks or permanent objects as to render the situation of the same reasonably certain from the notice itself. The object of the law being to direct attention in a general way to the vicinity or locality of the claim, where it appears that the location is made in good faith, it is the policy of the law not to hold the locator to a very strict compliance; but if the language employed in the description will, by any reasonable construction, in view of the surrounding circumstances, impart notice to subsequent locators, it is sufficient. The natural object referred to may be on or off the ground located. Even though the notice be wanting in clarity, it is binding as against one who had notice of the exact location of the claim.

Montana.

Riste v. Morton, 20 Mont. 139, 49 Pac. 656 (1897). A location notice which describes the claim as bounded by three other claims on three sides is prima facie sufficient. Such claims will be presumed to be well known natural objects or permanent monuments until the contrary appears.

Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869 (1899). “The courts always construe those notices liberally, and if, by any intendment, the proof can be reconciled and made consistent with the statement contained in them, the jury will be allowed to say whether or not, upon the whole proof, the identification of the claim is sufficient.” It is sufficient if the description in the notice contains directions which, taken in connection with the monuments on the ground, will enable a person of reasonable intelligence to find the claim and trace the lines. Whether the monuments erected upon the claim by the locator mark the boundaries sufficiently is for the jury and not for the court.

In a controversy as to the sufficiency of a location notice, it is not permissible to ask a witness whether a practical and experienced engineer.

familiar with surveys in mountainous countries, with the methods of locating claims in such places, and with a knowledge of the neighborhood, could take the description in the notice, and, starting at the discovery, find the claim. Such an inquiry calls for an expression of opinion and not of fact, and the inquiry appertains to no question of science, art, or trade, but to a determination of the question of the sufficiency of the acts done by a third person for the purpose for which they were intended, viz., the identification of the location or claim, which is a question for the jury on the facts of the case, and not for any witness. But a witness may be asked whether he found the boundaries of the claim without assistance, whether the blazing upon the posts and the marks on the boundaries of the claim appeared to be old or new, whether he could readily find the blazes on the trees along the end lines of the claim, and whether they could be traced or observed from one to the other; such questions all relate to matters of fact, a knowledge of which was gained by the witness from observation upon the claim.

Purdum v. Laddin, 23 Mont. 387, 50 Pac. 153 (1899). Section 3612, Pol. Code of Montana, provides that, within 90 days from the date of posting upon the claim the location notice required by § 3611, there must be filed with the county clerk a declaratory statement, containing inter alia "the location and description of each corner, with the markings thereon." This statute is mandatory, and substantial compliance with its provisions is necessary to perfect a valid location. Therefore, a declaratory statement of the location of a mining claim which describes it by metes and bounds but gives no description of each corner and the markings thereon is insufficient and the location accordingly invalid.

Walker v. Pennington, 27 Mont. 369, 71 Pac. 156 (1903). Section 3612, Pol. Code, is complied with by a declaratory statement which describes each corner as "a stake over four inches square, set at least one foot in the ground, and surrounded with a mound of earth and stone four feet in diameter and two feet high, and marked," etc. It is not necessary that the fact that the corner posts are at least four feet six inches in length, as required by § 3611, Pol. Code, should appear upon the face of the declaratory statement.

Hahn v. Jamcs, 29 Mont. 1, 73 Pac. 965 (1903). Section 3612, Pol. Code, provides that the recorded notice shall set forth the dimensions and location of the discovery shaft, tunnel or cut, and give the location and description of each corner of the claim, with the markings thereon. Held that a notice did not comply substantially with the statute when it contained no description of the discovery shaft, and did not show that there were markings at the corners of the location nor what the dimensions of the corner monuments were.

Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833 (1904). A declaratory statement does not satisfy the requirements of § 3612, Pol. Code, when it recites merely that the claim is a relocation of another claim on which the discovery was a shaft which was ten feet in depth and four and one-half feet in size, there being no statement that these were its dimen-

sions at the time of the relocation. The recitals in the statement "from the center of discovery shaft which is an open cut ten feet deep," and "beginning at an open cut which is the point of discovery," are neither of them sufficient to give, as a fact, the dimensions and location of the discovery shaft or its equivalent.

Section 3615, Pol. Code, provides that a relocation of an abandoned claim must be made by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were an original location, or the relocater may sink the original discovery shaft ten feet deeper, in which case the declaratory statement must give the depth and dimensions of the original discovery shaft at the date of the relocation. A declaratory statement is void, under this section, which contains nothing showing the dimensions and location of the discovery shaft, or its equivalent, if a new shaft was sunk as a basis of location; or showing the depth and dimensions of the discovery shaft upon the abandoned claim at the date of the relocation and that it was sunk ten feet deeper, if the relocation was based on such facts.

Dolan v. Passmore, 34 Mont. 277, 85 Pac. 1034 (1906). Section 3612, Pol. Code, as amended in 1901, requires that the declaratory statement shall contain the location and dimensions of the discovery shaft, or its equivalent, showing length, breadth and depth. This provision is mandatory and must be substantially followed in order that the locator may acquire any right under his location. Failure to observe this requirement is fatal to the location. The record cannot be supplemented by proof of what was actually done.

Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455 (1906). Section 3612, Pol. Code, as amended, is not complied with by a statement that "a shaft—feet and—feet in dimensions in ten feet six inches had been sunk" or that "a tunnel, the dimensions of which are—by—feet, and eleven feet eight inches in length had been run." These show but one dimension; the statement must raise the inference that the excavation cuts the vein at a depth, in case of a shaft, and at a length, in case of a tunnel, of ten feet below the surface.

Nevada.

Ford v. Campbell, 29 Nev. 578, 92 Pac. 206 (1907). The statement in a location certificate that "said claim is situated about two miles from the Town of A," no direction being given, is not such a description with reference to some natural object or permanent monument as will identify the claim.

Unless the recorded notice is in strict compliance with the law it is void as a record, but does not affect the validity of the claim. Its only effect is to deprive the locator of the use of the record as prima facie evidence of the facts contained therein. (This decision differs from the law as declared elsewhere, and is based on the language of the Nevada statute. See page 302, above.)

Utah.

Wilson v. Triumph Consol. Min. Co., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 718 (1899). The construction given a notice of location should be liberal and not technical, and a notice which refers to a known mining claim, with date of its location, or to recorded claims adjoining it, with a hoisting shaft, is a sufficient compliance with the law requiring reference to be made to some natural object or permanent monument.

Farmington Gold Min. Co. v. Rhymney Gold & Copper Co., 20 Utah, 363, 58 Pac. 832 (1899). The statute respecting the location of mining claims should be construed with liberality, and the sufficiency of the location, with reference to natural objects or permanent monuments, is a question of fact. Where a location is made in good faith, the locator should not be held to a strict technical compliance with the law in respect to his notice, and if, by any reasonable construction in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient.

Muldoon v. Brown, 21 Utah, 121, 59 Pac. 720 (1899). The date of location required to be given in the notice is the correct date and not a fictitious or fraudulent one. Where a locator fraudulently antedates his notice for the purpose of defeating an actual prior locator, his act is fraudulent both as against the rightful claimant and as against the government.

Wells v. Davis, 22 Utah, 322, 62 Pac. 3 (1900). The law will not hold the locator of a mining claim to a strict and technical observance of the statute in respect to the terms of his notice, so long as he substantially complies with its requirements; and if it appears that the location was made in good faith, and by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient.

Fissure Min. Co. v. Old Susan Min. Co., 22 Utah, 438, 63 Pac. 587 (1900). The construction of a notice should be liberal, and not technical, and its sufficiency with reference to natural monuments or permanent objects is a question of fact.

Bonanza Consol. Min. Co. v. Golden Head Min. Co., 29 Utah, 159, 80 Pac. 736 (1906). A location notice is sufficient which shows a discovery made upon a vein or deposit bearing precious metals; the amount of ground claimed; the length of the claim, giving the distance in opposite directions from the discovery; that the claim was staked at both ends and at the corners in a lawful way; refers to another claim as the one nearest to it; contains the name of the claim, the signature of the locator, the date of location and of record, and the county and mining district where located; there being also proof to show that the description and marking of the boundaries indicated in the notice are true, that a stake and notice was posted at each discovery, and that a stake three or four inches in diameter and four to four and one-half feet high was marked and put up at each corner except one corner where a stump was marked as the corner, that the stakes were driven into the ground at the respective

corners and numbered as indicated in the notice, that they were reset from time to time and kept up, and that the surveys for patent were made covering the ground practically as originally located and staked. "These notices, where the ground was actually marked as shown by the proof herein, although in some particulars indefinite and subject to criticism, were not calculated to mislead the public. Any prospector who appeared and read the notices could readily identify the ground embraced within the description. Such a notice is a sufficient compliance with the statute, and when it substantially complies with the statute it is sufficient for record. * * * The circumstances and conditions of the surrounding country may be, and doubtless in many instances are, such that stakes driven firmly into the ground will afford the best means to identify the claim and the discovery. In such cases such identification will be considered as a sufficient compliance with the statute."

Washington.

National Mill. & Min. Co. v. Piccolo, 54 Wash. 617, 104 Pac. 128 (1909). In an action to recover unpatented mining claims, the defendant, who had ousted the plaintiff who had been in possession for eight years, could not take advantage of a technical insufficiency in the description in the location notice which could not, and did not, mislead him.

Wyoming.

Columbia Copper Min. Co. v. Duchess Min., Mill. & Smelting Co., 13 Wyo. 244, 79 Pac. 385 (1905). A notice of location as follows: "We, the undersigned, claim by right of discovery this ledge, lode or deposit described as follows: 1,500 feet in a northwesterly direction from this notice, and 300 feet on each side of this vein. Dated this 17th day of July, A. D. 1901," and signed, is a substantial compliance with the requirements of § 2546, Rev. St. Wyo. 1899.

Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36 (1906). A location certificate which fails to give the length of the claim along the vein, measured each way from the center of the discovery shaft, as required by the statute, is defective.

What is a natural or fixed object within the requirements of Rev. St. 2324 is a question of fact. A mining claim is treated as a fixed object. If the ground located is upon surveyed land, the certificate must refer to the section or quarter section corners.

(c) Verification of the Certificate.

p. 250.

Idaho.

Dunlap v. Pattison, 4 Idaho, 473, 42 Pac. 504, 95 Am. St. Rep. 146 (1897). Where a location is made by an agent or attorney in the name of his prin-

cipal, the affidavit to the record of notice, required by Rev. St. Idaho, § 3104, may be made by such agent or attorney.

Van Buren v. McKinley, 8 Idaho, 93, 66 Pac. 936 (1901). The provision of Rev. St. Idaho, § 3104, and amendments thereto, requiring an affidavit to the recorded notice, is not in contravention of the provisions of § 2322 Rev. St. U. S.

Such an affidavit must be sworn to before an officer authorized by law to administer oaths. A district recorder appointed by the resident miners has no authority to appoint a deputy, and the person so appointed has no authority to administer oaths. (The present statute of Idaho on this subject is found in Civ. Code, § 2564.)

Montana.

Mares v. Dillon, 30 Mont. 117, 75 Pac. 963, Id., 30 Mont. 144, 75 Pac. 969 (1904). The verification of the declaratory statement required by Pol. Code, § 3612, need not be made upon the personal knowledge of the affiant.

Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806 (1905). The Act of 1873, which requires the recording of a declaratory statement verified "on oath before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States," is not unconstitutional as being in conflict with R. S. 2324, which does not require the statement to be verified. That act is not complied with by an affidavit reciting that A and B "who being first duly sworn, on oath each says for himself that he is of lawful age, a citizen of the United States, and that the foregoing notice by them subscribed, is a true copy of the original notice of location of the claim above described as posted thereon, on the day stated." (The present statute of Montana covering this subject is found in the Laws of 1907, p. 20.)

(d) Amendment of the Record. Additional Certificates.

p. 251. The locator may by means of an amended or additional certificate change the lines of the claim and thus include within them ground that was not part of, but adjoined the claim as originally located. His right to do so, however, is subject to the rights which may have been acquired in the interval by other parties who have made location of this ground. Subject to this proviso, and to the restriction that he must not depart from his discovery and that he must comply with all the other requirements of location, the locator may shift the lines of his claim at will.

When, however, an amended certificate is filed for the purpose of curing defects, of supplying omissions or correcting mistakes, and does not include territory not covered by the original certificate, it relates back to the date of the original certificate, not-

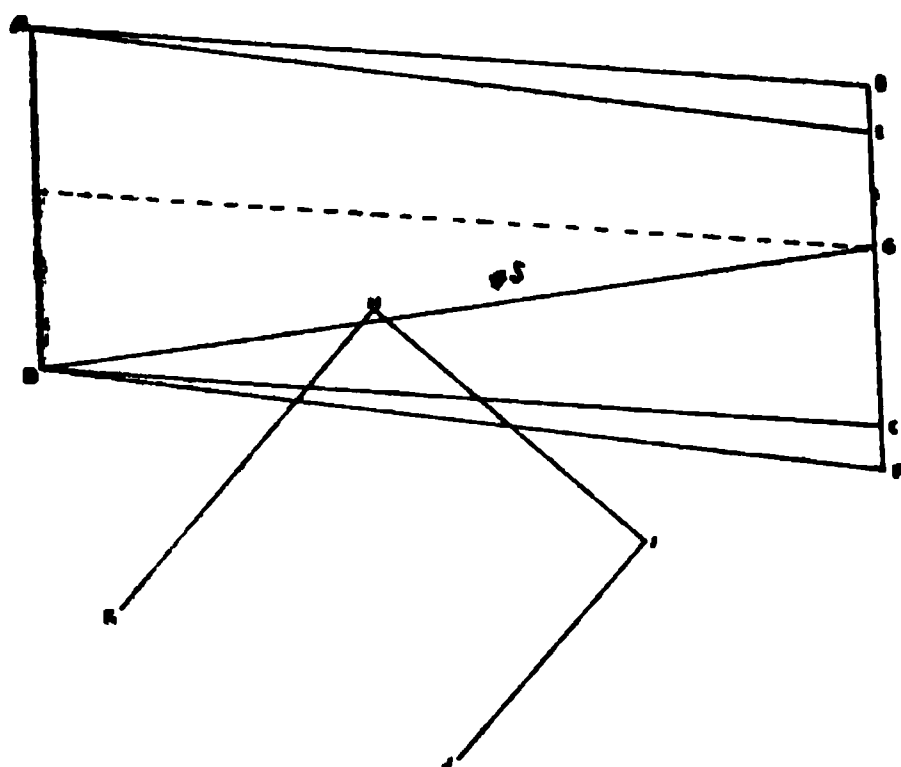
withstanding intervening rights may have accrued. If the time within which an amended certificate must be filed has not expired, the subsequent locator takes with notice of the prior locator's right to amend.

The amendment of the record is an essentially different thing from relocation, which is an entirely new location of ground, the possessory title to which has been lost by forfeiture or abandonment. An amendment or an additional certificate may not, therefore, be used as a substitute for a relocation or as a means of acquiring title to forfeited or abandoned ground.

In addition to the statutes cited in vol. 1, p. 251, n. 3, see Arizona Rev. St. of 1901, § 3237; Idaho Civ. Code, § 2566; Montana Laws of 1907, p. 21; Nevada Comp. Laws, § 213; North Dakota Pol. Code, § 1811; South Dakota Pol. Code, § 2543; Washington 3 Bal. Ann. Codes, § 3151a.

United States.

Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co., 125 Fed. 389 (1903). C. C. D. Nev. The Valley View lode claim was located Aug. 25, 1900, the discovery monument being in the middle of the east end line, which was 600 feet long. Subsequently, a discovery shaft was sunk south of the middle line of the claim, and on April 16, 1901, an amended location certificate was filed by which the south east corner was thrown some 83 feet southwardly and the lines changed as shown in the diagram. The Pyramid was located in May, 1902, and overlapped the Valley View.



A. B. C. D.=Valley View as originally located.
A. E. F. D.=Valley View amended location.
G. D. F.=Pyramid.
G.=original discovery Monument of Valley View.
S.=Valley View Discovery Shaft.

It was held that the Valley View was entitled to the ground described in the amended location certificate and the claim of the owners of the Pyramid to the triangle C. D. F. was disallowed.

Hawley, D. J.: "The right of the original locators to change the original location, so long as such change does not interfere with the existing rights of others acquired previous to such change, is unquestioned." The statute of Nevada, March 16, 1897, gives 90 days in which to file a certificate of location and

provides for the filing of an additional or amended certificate of location. "The courts previous to the enactment of statutes of this

character held that the locator, after posting his notice of location, should be allowed 'a reasonable time' within which to perfect his location. * * One of the objects of the state statute was evidently to make this time certain and definite. The Legislature of this state, in enacting this statute, recognized that difficulties are always liable to present themselves to the enterprising prospector, especially in districts where no actual development has been made, to determine with accuracy and precision the course of the ledge which he has discovered, its apex and width. The statute gives to the locator of the lode 90 days to take such bearings as he can to guide him in marking and defining his boundaries, and further provides that if he discovers that he has made mistakes, has taken up more or less ground than he is entitled to, or from any cause that his location is defective or erroneous, he may relocate or change his boundaries, provided the same does not interfere with the existing rights of others.' It gives the original locator the full measure of the rights which the mining laws permit him to acquire as the reward of his energy in discovering the mineral lode or vein. It has always been the policy of the government to encourage its citizens in searching for, discovering and developing the mineral resources of the country; and this policy can always be best subserved by permitting the discoverer to rectify and readjust his lines, whenever from any cause he desires to do so provided he does not interfere with or impair 'the intervening rights of others.' There is no statute, law, rule, or regulation, state or national, which denies this right. The amended certificate of location, when made, becomes the completed location of the discoverer, and is just as valid as if it had been made in the first instance. It necessarily follows that parties coming upon the mining claim and ground described in the amended certificate of location, subsequent to the perfection of such amended location in compliance with the mining laws, can acquire no rights, because they have not been injured, and have no right to complain."

"The broad contention of the complainant * * * is, that the locators of the Valley View must be held to the lines of its original location; that they acquired no new rights in their amended location, because it included ground not within its original boundaries, and they did not make any relocation of such new territory, and did no annual assessment work thereon, and did not make any discovery of mineral therein and were never in the actual possession thereof. The law does not require that such things should be done in order to make the claim, as described in the amended certificate of location, valid to the full extent of the boundaries therein described, as against any subsequent locator of any portion of said ground. * * In making the additional amended notice, it was not necessary for him to take physical possession of the additional ground, sink new shafts or make any new discoveries of mineral."

Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co., 125 Fed. 400 (1903). C. C. D. Nev. The original location of the Wandering Boy (K. H. I. J. on diagram) was made after the original location of the Valley View, but before the amended location of that claim. The intention was expressed in the certificate of location not to claim anything within the lines of the Valley View. After the amended location of the latter, a survey was made

of the Wandering Boy and an amended certificate of location filed, conforming to the new lines of the Valley View. Held that the owner of the Wandering Boy was not entitled to any ground north of the line D F. "It is always competent for the owner of adjoining mining claims to adopt the line established by a prior survey as their boundary or division line and when such line is adopted and agreed to by unequivocal acts from which an agreement may be clearly implied, whether it is the correct one or not, they will be conclusively bound by it. Such agreement is not within the statute of frauds."

Porter v. Tonopah North Star Tunnel & Development Co., 133 Fed. 756 (1904), C. C. D. Nev., affirmed in 76 C. C. A. 657, 146 Fed. 385 (1906). 9th Circ. "However regular in form a junior location might be, it is of no effect as against the rights conferred upon the prior locator, so long as the prior location is subsisting."

Complainant located his claim August 26, 1901, and recorded his location certificate Sept. 2, 1901. Defendant's location certificate was filed Oct. 10, 1901. It was found as a fact that complainant's claim as described in his certificate did not include any of defendant's ground. Complainant, however, had recorded an amended certificate on May 27, 1902. Since this was after the expiration of the 90 days allowed by the Nevada statute for the filing of an amended certificate, and was also subsequent to the defendant's location, it was, so far as it covered any portion of the latter, postponed to the rights of the defendant.

Biglow v. Conradt, 87 C. C. A. 48, 159 Fed. 868 (1908). 9th Circ. See this case on page 270.

Arizona.

Kinney v. Lundy, 89 Pac. 496 (1907). Rev. St. of Arizona 1901, § 3241, prescribing the manner in which an abandoned or forfeited claim may be located, provides that the notice shall state whether the whole or any part of the claim is located as abandoned property; otherwise it shall be void. It was held that taken in conjunction with § 3238, providing for the amendment of location notices and the changing of monuments to correspond with such amendments, the word "void" means "voidable." A location notice which is defective by reason of noncompliance with the above requirement may be amended by filing an amended notice complying with the statute, provided the rights of others have not intervened. Such amended certificate will relate back to the date of the original location.

Colorado.

Hallack v. Traber, 23 Colo. 14, 46 Pac. 110 (1896). H. held title to a mining claim as trustee for himself and others. He filed an additional location certificate, taking in additional ground, and then obtained a patent for the claim as amended. He was held to be trustee as to this additional ground as well as of the original claim.

Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69 (1896). If the original recorded certificate was so defective as to absolutely fail to comply with the statutory requirements and define the claim, it was void, and a second certificate, called an amended location certificate, was not amendatory so as to relate back to the date of the first, and the locator's rights were controlled by the date of the second certificate, there being an intervening location by the other party. But if the original certificate was not void, but only lacking in technical detail and was capable of amendment, then the second would be considered amendatory, would relate back to the date of the first, and both should be regarded as one and both be put in evidence.

Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109 (1898). Certificates of location of mining claims which are defective in that they contain no reference to a natural object or permanent monument may be cured of such defect by amendment, under § 2409, Gen. St. of Colorado. This section qualifies the declaration in § 2400 that such certificates are void, since to be susceptible of amendment they must have some force and validity. The amendment perfects the record as of the date of the original certificate, notwithstanding the fact that meanwhile other claimants have undertaken to relocate the ground. The proviso of § 2409, to the effect that such amendment shall not "interfere with the existing rights of others at the time of such relocation," is only applicable to a change of boundaries and a relocation that would take in territory not before included within the claim.

Duncan v. Fulton, 15 Colo. App. 140, 61 Pac. 244 (1900). When the original certificate of location may be deemed void, an additional one may be filed to correct its defects, and both may be put in evidence in subsequent judicial proceedings, and if therefrom, and not necessarily from one alone, but from either one or both together, the claim is properly described and adequately located by reference to a natural object or permanent monument, the locator has fully complied with the law. In this case the defect arose from the inadequacy of description, there was no intervening location, and *Frisholm v. Fitzgerald* was followed.

Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633 (1901). An amended certificate under M. S. A. § 3160 may be filed on a placer.

Gurney v. Brown, 32 Colo. 472, 77 Pac. 357 (1904). The filing of amended location certificates cannot change or enlarge a locator's rights, if, prior thereto, the premises had been located by another person at a time when they were open to location.

Sullivan v. Sharp, 33 Colo. 346, 80 Pac. 1054 (1905). Where a location was made within the limits of an existing and valid claim, and therefore was void, the locator thereof can acquire no additional rights by filing an additional location certificate under the provisions of M. S. A. § 3160, after the prior locator had failed to perform his assessment work for one year. The purpose of that statute "was to permit the locator to cure errors and defects or supply omissions, so that a location which was merely defective might be rendered perfect, and also take in territory embraced in abandoned overlapping claims if so desired. It cannot avail, however, except it appears that there has been an original location which is valid, though

imperfect. In other words, there must be some rights in the locator filing such certificate to the ground which it purports to include; otherwise it is of no effect."

Idaho.

Morrison v. Regan, 8 Idaho, 291, 67 Pac. 955 (1902). Under Civ. Code, § 2566, an amended location relates back to the date of the original location, provided it does not interfere with the existing rights of others at the time when such amendment is made. This proviso, however, does not apply to amended locations, where, by the amendment, the surface boundaries are not changed, or when no part of an overlapping claim which has been abandoned is taken in by such amended location. It only applies where the boundaries are changed, or where part of an overlapping claim which has been abandoned is taken in.

An agent or any one authorized to do so can make an amended or additional location. Such authority is not required to be in writing.

Bismark Mountains Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho, 516, 95 Pac. 14 (1908). Section 5, Sess. Laws 1899, p. 238, provides that if at any time the locator or his assigns shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, he may file an additional certificate, provided that it does not interfere with existing rights of others. Such an amended certificate relates back to the date of the original location, unless it takes in ground not covered by the original notice of location, and which has been located by others prior to the filing of the amended certificate. So far as that is concerned the certificate does not relate back.

Montana.

Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833 (1904). A locator may, under the provisions of the act of 1901 (Laws 1901, p. 56), record an amended declaratory statement, to correct a mistake in the original notice, describing the claim as running easterly and westerly when in fact it was staked out on ground as running in a northerly and southerly direction. This does not amount to a relocation of the claim, but simply conforms the description as stated in the original recorded declaratory statement with the actual staking on the ground as made at the time the original location was made.

Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177 (1907). An amended declaratory statement, the purpose of which is to cure defects in the original, puts the locator, in the absence of any intervening rights, in the same position he would have occupied had no such defects existed, and relates back to the date of the original location. The affixing of an additional name to the claim in the amended statement does not invalidate it, since it is the description of the ground embraced rather than the name of the claim that is important.

Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 Pac. 935 (1908). The purpose of filing an amended declaratory statement of the location of a mining claim (authorized by Laws of 1901, p. 56) being to cure defects in the original, it can confer no rights in the property which did not exist prior to its filing, but relates back to the original location. Hence it follows that except as against intervening rights it serves the same purpose in its admission as evidence as the original certificate, and its admissibility is not affected by reason of its being filed subsequent to the commencement of suit on an adverse claim.

LAND OFFICE DECISIONS.

"The amended location authorized by the Colorado law is essentially different from the relocation authorized by sec. 2324 of the Revised Statutes. The former is made in furtherance of the original location and for the purpose of giving additional strength or territorial effect thereto, while the latter is a new and independent location which can only be made where the original location and all rights thereunder have been lost by failure to make the necessary annual expenditure." "Teller's rights under the amended locations depend upon his ownership of the original locations and if at that time they were owned or partly owned by others their title was not divested or lost by his amended location." *John C. Teller*, 26 L. D. 484 (1898).

Title acquired by location cannot be divested by an amended location by omitting therefrom the name of one of the original locators unless it is done with his consent. *Samuel H. Auerbach*, 29 L. D. 208 (1899).

(e) Mistakes in the Record.

p. 253.

(f) Requirements as to the Time and Place of Recording Certificate.

p. 254. See, also, page 281, above. Requirements as to the time of recording the certificate are directory and not mandatory. The object of the record is notice; and a subsequent locator with actual notice should not be permitted to set up the prior locator's failure to record. He is, however, chargeable with constructive notice only when the certificate of the prior location has been recorded within the prescribed time, or, if not within that time, then before his rights accrued.

United States.

Last Chance Mtn. Co. v. Bunker Hill & S. Min. Co., 66 C. C. A. 299, 131 Fed. 579 (1904). 9th Circ. Failure to comply with § 3103, Rev. St. Idaho 1887, providing that location notices must be recorded within 15 days after

the making of the location, but prescribing no penalty for such failure, does not work a forfeiture of the claim in favor of a subsequent locator who had actual notice of the prior location, the prior locator being in actual possession of the claim and actually engaged in working it. The Bunker Hill was located on Sept. 10, and notice was recorded on Sept. 29. The Last Chance was located Sept. 17 and notice recorded on Sept. 22. At the time of the later location, therefore, no part of the Bunker Hill was open to location by any person.

Zerres v. Vanina, 134 Fed. 610 (1905). C C. D. Nev. Section 210, Comp. Laws Nev. 1900, requiring the certificate of location to be recorded within 90 days after posting notice, is not mandatory but directory, provided no adverse rights have intervened. And even when adverse rights have intervened they will be of no avail unless they are founded upon a valid location.

In the absence of any provision in the statute prescribing a forfeiture for failure to record within a specified time, a locator who is in actual possession and working his claim will be protected although he failed to record his location within the time prescribed by the statute of the state or the rules of the mining district. Failure to record does not deprive the locator of all his rights to the ground provided he has substantially complied with the other requirements of the mining laws. The record is the inception of what may be called the paper title. It does not itself constitute title or possessory right.

Arkansas.

Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87 (1902). If the location notice is recorded before any adverse rights to the same ground are acquired, it is sufficient, even if it was not recorded within thirty days.

Colorado.

Shepard v. Murphy, 26 Colo. 350, 58 Pac. 588 (1899). Under § 3150, M. A. S., which provides that "the discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain," etc., if the instrument thus required to be recorded is lodged with the proper officer for that purpose, and the person so depositing it does all that the law requires of him as conditions precedent to the right to have it recorded, or if these conditions are and can be waived by the officer, it is constructive notice to all those who thereafter deal with the property, even if the recorder neglects to record it. In the present case "the plaintiff lodged his location certificates with the proper officer, and was notified that they would be recorded. It is true the fees were not paid in advance, but that condition was waived. Under the facts, we are clearly of opinion that plaintiff did all the law required of him in respect to recording his claim."

Utah.

In re Monk, 16 Utah, 100, 50 Pac. 810 (1897). Section 8, c. 36, Laws 1897, providing that county recorders shall perform duties theretofore performed by district mining recorders, is constitutional. It does not conflict with Rev. St. 2324.

Wyoming.

Columbia Copper Min. Co. v. Duchess Min., Mill. & Smelting Co., 13 Wyo. 244, 79 Pac. 385 (1905). A certificate of location filed 61 days after discovery, the 60th day being a Sunday, is valid. Even if filed after 60 days such a certificate is valid if no other persons acquire intervening rights between the expiration of the 60 days and the actual filing of such certificate.

Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36 (1906). The failure to record the location certificate within the statutory period is fatal only in case other rights intervene.

CHAPTER VIII.

THE EXTENT OF THE CLAIM.

I. Lode Claims.

— II. Placer Claims.

p. 255. The circuit court of appeals of the ninth circuit has confined the decision in *Lakin v. Roberts* to the particular facts of that case. Although a patent may apparently be attacked collaterally on the ground that it includes an amount of ground in excess of the statutory limit, in such a case the presumption is that the patent is valid and no inference of invalidity may be drawn from anything that appears on its face.

I. LODGE CLAIMS.

p. 256. When the excess consists in the width of the claim, the portion of the claim as to which the location is void is easily determined. It is that portion lying outside of side lines drawn at the proper distance from the middle of the vein. If, however, the excess is in the length of the claim, there can be no fixed rule as to the end from which the excess is deducted. It would seem, following the analogy of the placer cases, that a locator, who is acting in good faith, is in possession and working his claim, may elect which portion he will retain and which reject.

On the subject of the effect produced upon the extent of the claim by the departure of the vein through one or both of the side lines, see chap. XV, div. I, below. By Civ. Code of Idaho, § 2556, it is provided that, where the locator has marked the line of the vein, the monuments must be taken, for the purposes of the location, to mark correctly that line and cannot afterwards be changed so as to affect the rights of others.

As to the width of lode claims excepted from a placer claim under Rev. St. 2333, see chap. XV, div. III, below.

United States.

Peabody Gold Min. Co. v. Gold Hill Min. Co., 49 C. C. A. 637, 111 Fed. 817 (1901), 9th Circ., affirming 97 Fed. 657 (1899). C. C. N. D. Cal. A patent for mineral land was attacked in this case on the ground that it covered surface ground in excess of 300 feet in width from the center line of the lode. "If, upon any theory of the facts, the patent may be sustained, it is the duty of the court to indulge the presumption that the facts existed, and were properly brought to the attention of the officers of the land department before the patent was issued. All intendments are in favor of the validity of the patent. Before it was issued the officers of the land department were required to ascertain whether the necessary antecedent steps had been taken which justified its issue." "A patent which has been in existence for 16 years, and which protects rights that have been continuously exercised by the patentee and his predecessors in interest for nearly 50 years, will not be declared void as to any portion of its granted premises solely for the reason that upon its face it purports to be based upon a single mining location, and conveys more than may lawfully be included in one location, when in fact the claims were several, and might have been united in a single patent upon a proper presentation of the facts." "The judgment in that case (*Lakin v. Roberts*, 4 C. C. A. 438, 54 Fed. 461, see vol. 1, p. 257) was rendered upon an agreed statement of facts, in which it was made to appear that the land in controversy, which was occupied as a townsite, was included within the area of the patented mining claim, but that there had never been any actual possession of that portion of the surface ground by the mining company, and that the right of the miners in that locality to a mining claim was not determined by rule or custom but depended upon actual occupation of the surface. Under this admission of the facts, the land in controversy in that case was held to be excluded from the operation of the patent. The admitted facts effectually rebutted the presumption which otherwise would have attended the patent, the presumption that the locator was lawfully entitled to all the premises described in his grant, and that all the previous requisites of the law had been complied with."

Alaska.

Pratt v. United Alaska Min. Co., 1 Alaska, 95 (1900). "Embracing by accident more than the lawful quantity of ground within a location has never been held, unless the excess was very great, to invalidate the location; but the question of taking more land within a claim as staked by faulty measurement and that of claiming by the terms of a location notice are entirely different. In the one case the error is merely accidental; in the other case the excess is taken with deliberate purpose. Question: Does a mining notice, which includes by its terms more land than is permitted by the mineral laws of the United States, invalidate the location? The court is not aware of any decision upon this precise point, and, while the

question is not passed upon at this time, it would seem that such a notice clearly in violation of the law would invalidate the entire location."

California.

McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823 (1907). When a location of a lode claim made in good faith exceeds the width prescribed by Rev. St. 2320, the location is void only to the extent of the excess, and the locator is entitled to all of the surface included within lines drawn at the distance of 300 feet from the middle of the vein at the surface. The side lines of the lode claim are not required to be straight, and, in determining the proper position of such lines, the court may fix as many intermediate corners as is necessary to give the locator the territory of the prescribed width within his original lines.

Colorado.

Taylor v. Parenteau, 23 Colo. 369, 48 Pac. 505 (1897). By M. A. S. 3149, the width of claims in Gilpin, Clear Creek, Boulder and Summit Counties, shall be 75 feet on each side of the center of the vein or crevice. Where a claim has been located in violation of this statute, "such parts of the ground as lie outside of a line parallel to the side lines and seventy-five feet from the discovery shaft are located without authority and as to such excess the location is void." It was argued by appellant that the measurement need not be made at the discovery shaft, but that the location was valid if the side lines at any point were within seventy-five feet of the center of the vein.

Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57 (1903). Where the end lines of a claim are not at right angles with the side lines, the width of the claim is the distance between the side lines, and not the length of the end lines, and it is the former distance which determines whether the claim is within the width allowed by law.

Idaho.

Stem-Winder Min. Co. v. Emma & Last Chance Consol. Min. Co., 2 Idaho, 421, 21 Pac. 1040 (1889). Where a locator intending to locate a claim 1,500 feet in length and 600 feet wide makes his measurements by the eye and by stepping off distances, and thus includes a greater area than the law permits, the location is not wholly void, but only as to the excess. The lines may be readjusted upon a subsequent survey.

The lateral measurement of the claim at the time of discovery must be from the middle of the point of discovery unless the vein has been actually established and run.

Montana.

Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869 (1899). Where a locator posts a notice of location which claims simply 1,500 feet along the lead, but says

nothing as to the direction in which this is to be measured, the locator thereby establishes a right for the statutory period of 20 days to 1,500 feet along the lead, but he is limited in this right to 750 feet on either side of the point of discovery. The fact that in making the location he thereafter included within his boundaries ground not legitimately covered by his notice, if this was done in good faith, as the result of ignorance or inadvertence merely, would not invalidate his claim in so far as it includes what was legitimately covered by the notice.

Oregon.

Gohres v. Illinois Min. Co., 40 Or. 516, 67 Pac. 666 (1902). Where a locator has made an excessive location through an innocent mistake, his claim is void only as to the excess.

South Dakota.

McPherson v. Julius, 17 S. D. 98, 95 N. W. 428 (1903). A claim which is excessive, either in length or width, is void only as to the excess, unless the locator has been guilty of fraud, especially where the defect is cured before rights have been acquired by a subsequent locator.

Utah.

Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019 (1901). The place where the notice of the location is posted, which in Utah must be the place of discovery, is the initial point on the lode from which the boundaries of the claim can only be determined when it is six hundred feet in width.

II. PLACER CLAIMS.

p. 259. Where the locator who has made an excessive location is in possession and working the claim, he may elect which portion to reject as excess. A subsequent locator cannot determine this for him.

An association claim may not be made the cover by which a single person acquires more than twenty acres by one location. The use of dummy locators, who knowingly are parties to the fraud, will avoid the location of more than twenty acres for the benefit of a single individual.

United States.

Durant v. Corbin, 94 Fed. 382 (1899). C. C. D. Wash. "The policy of the government in disposing of the mineral lands. * * * is to make a

general distribution among as large a number as possible of those who wish to acquire such land for their own use, rather than to favor a few individuals who might wish to acquire princely fortunes by securing large tracts of such land; and it is contrary to this policy and to the provisions of sections 2330 and 2331 for one person to cover more than 20 acres of placer ground by one location by the device of using the names of his employes and friends as locators."

McIntosh v. Price, 58 C. C. A. 136, 121 Fed. 716 (1903), 9th Circ., affirming *Price v. McIntosh*, 1 Alaska, 286 (1901). Where a local rule prescribed that placer claims should be 1,320 feet long by 660 feet wide (this rule was held to be void by the court below. See page 352, below), and a locator by mistake staked out his claim less than 1,320 feet long and more than 660 feet wide, but took possession of the land and worked it, another cannot oust him from the part where he is mining and make a location thereof for himself. The original locator has the right to elect which portion of the claim he will surrender.

Walton v. Wild Goose Min. & Trading Co., 60 C. C. A. 155, 123 Fed. 209 (1903). 9th Circ. An excess of ground in a placer location does not invalidate it but merely renders it voidable as to the excess.

Zimmerman v. Funchion, 161 Fed. 859 (1908). 9th Circ. "Where a prior locator is in the actual possession of a claim (placer) which as a matter of fact exceeds the limit of 20 acres, and is diligently working the same in good faith, he is at liberty to elect what portion of the claim he will reject as the excess," and a subsequent overlapping locator cannot compel him to surrender the overlap as excess, when he did not know of the excess at the time the subsequent location was made.

Cook v. Klonos, 164 Fed. 529 (1908). 9th Circ. C. and R. acting under the direction of B. located an association claim of 160 acres in the names of themselves and six others. The latter were relatives of B., from whom he held letters of attorney to locate claims in Alaska, in which it was understood that he was to have a half interest. It was held that they were not bona fide locators, and that the location was a fraud upon the government and void. "The question here is, not whether an individual can purchase mining claims after they have been located and hold them in his own name, but whether an individual can by the use of the names of his friends, relatives or employes as dummies, locate for his own benefit a greater area of mining ground than that allowed by law. If such proceedings were to be recognized as legal, then in this case Barnette was at the time of the location of the claim, and ever since has been, the principal locator of 160 acres, and yet he was not himself a locator by notice on the ground or of record, and he is not a party to this action." "The mineral land laws of the United States are extremely liberal in the requirements under which possessory rights may be acquired. The few restrictions imposed are only intended to prevent the primary location and accumulation of large tracts of land by a few persons, and to encourage the exploration of the mineral resources of the public land by actual bona fide locators. The scheme of using the names of dummy locators in making the location of a mining claim for the purpose of securing a concealed interest in such claim appears

to be contrary to the purpose of the statute; but when this scheme is used to secure an interest in a claim for a single individual, not only concealed but in excess of the limit of 20 acres, it is plainly in violation of the letter of the law, and, when, as in this case, all the locators had knowledge of the concealed interest and were parties to the transaction, it renders the location void."

Waskey v. Hammer, 170 Fed. 31 (1909). 9th Circ. A location made in good faith and otherwise conformable to law is not rendered wholly void because it exceeds twenty acres in area. It is void only as to the excessive area, and the locator is at liberty to select the portion of the claim that he will reject as such excess. Where, however, in drawing in his line, he excludes the part of the ground containing his discovery, he thereby abandons one of the essential elements of his location, which is therefore not perfected until he makes a further discovery within the re-established lines.

Jones v. Wild Goose Min. & Trading Co., 177 Fed. 95 (1910). 9th Circ. The N. placer claim was located January 1, 1901, by a notice and recorded certificate which described an area of 20 acres, but as actually marked upon the ground there was, by inadvertence and honest mistake, embraced within the claim an excess amounting to slightly over 2½ acres.

In 1908 the plaintiff, who was negotiating for a lease of part of this claim, made a survey, and discovered the fact of the excessive location, whereupon, without giving the owners of the claim any notice of the fact, he located and staked off a portion thereof, embracing about 2½ acres at one end of the claim. Subsequently, the owners of the claim, having acquired a knowledge of the excessive location, caused the claim to be surveyed and rejected 2½ acres at the other end thereof, and made an amended location of the remaining 20 acres. The plaintiff, at the time he made his location, was a wrongdoer, an intruder and trespasser upon the possessory rights of the other party, and his attempted location was void for any purpose, and initiated no rights in him, for the reason that the ground covered thereby was at the time, in the eye of the law, in the exclusive possession of the defendants under a valid subsisting location, and they were unaware of and had not been notified of the excess, nor were they given any opportunity to exercise their right to select and reject the excess. Until they had received such notice and were given an opportunity to exercise their right, the whole claim was so far segregated from the public domain as to exempt it from relocation. Had the plaintiff, after giving notice of the excess, waited a reasonable time for the defendants to exercise the right to select and reject and then relocated, a different question would have been presented, and by a subsequent discovery he might then, perhaps, have brought himself within the rule announced in *Creede & Cripple Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.*, 196 U. S. 337, 49 Law. Ed. 501.

Colorado.

Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633 (1901). A placer claim for 40 acres is valid, if made by two locators. "A number of individuals

may locate a claim in common, not exceeding 20 acres to each person, and not exceeding 160 acres in any one claim."

Oregon.

Gohres v. Illinois Min. Co., 40 Or. 516, 67 Pac. 666 (1902). Where a locator through an innocent mistake has made a placer location of 34.50 acres, and upon discovery of the fact procured another man to relocate 14.50 acres and then to deed it to the original locator, the latter is estopped to deny that the portion of his original claim for which he procured the relocation was the excess.

LAND OFFICE DECISIONS.

Under no circumstances can an entry for a placer claim be allowed to stand for more than 160 acres. The rule of approximation under which persons seeking title to nonmineral public lands are permitted to pay for and include whatever excess there may be in the claims asserted over and above the amount limited by law is inapplicable to mineral entries. *Chicago Placer Min. Claim*, 34 L. D. 9 (1902).

A corporation, regardless of the number of its stockholders, can lawfully locate as a placer claim no greater area than twenty acres. Whenever a corporation locates a claim under the mining laws, it does so in its strictly corporate capacity, and it is with respect to it as a corporate entity, rather than in the collective capacity of the stockholders, that the provisions of those laws should be applied. A corporation is not an "association of persons" within the meaning of that term as used in Rev. St. 2330. *Igo Bridge Extension Placer*, 38 L. D. 281 (1909).

CHAPTER IX.

HOW MINING CLAIMS ARE HELD —ASSESSMENT WORK.

p. 263. The performance of annual work is the condition upon which the locator retains the possession and the right of possession of his claim. It has no relation to the right to obtain a patent, and since it relates only to the possessory title, it is a matter of importance only as between rival claimants to the ground. The failure to perform the required annual work does not and cannot result in any action by government to terminate the locator's right of possession. It does not ipso facto work a forfeiture; it only subjects the claim to forfeiture which is brought about by a relocation by an adverse interest. Until such a relocation is made, the prior locator may avoid a forfeiture and preserve his title by a resumption of work in good faith. When work is thus resumed and diligently prosecuted until a sufficient amount has been completed to hold the claim for one year, the condition of the continued right of possession is fulfilled for that year, and it is of no importance that work for previous years has not been done. Nor is the failure to have done that work evidence of absence of good faith in the resumption of work.

When, however, application has been made for a patent and has proceeded so far as entry and payment of purchase money, the applicant's rights no longer depend upon his possessory title, and he is no longer obliged to protect that against relocation by doing assessment work. See cases under chap. XIV, div. I, D, below. If he is prevented from reaching entry by the intervention of an adverse claim, he is likewise from that time relieved of the obligation to do work upon his claim. His rights then depend under the statute upon the result of the action upon the adverse claim, which is of course based upon rights as they stood at the time of the bringing of these proceedings and is unaffected by subsequent attempts at relocation.

The forfeiture of the interest of a co-owner does not result merely from his failure to do his share of work or to contribute his proportion of the cost thereof; it results only when such delinquency follows the notice required by Rev. St. 2324. If the co-owner is dead, a notice is sufficient which is addressed to him

by name and his heirs, or generally to his heirs. A single notice may contain claims for more than one year's expenditure, or for expenditure on more than one claim, but in the latter case it should show the amount spent on each or the facts that would justify joint expenditure.

Proceedings to forfeit the interest of a co-owner, however, are ineffective, if the forfeiting owner has actually not done the work. The other is always at liberty to establish this fact. The preservation by record of proof of delinquency and of contribution is now provided for in Arizona Rev. St. 1901, §§ 3247-8; California Act 1891, c. 155, p. 219; Nevada Comp. Laws 1900, § 218.

Although the work need not be done within the boundaries of the claim, the burden of proof is upon the party who claims to have done his work outside of the claim, both that it was intended as annual work and that it inured to the benefit of his claim. Ordinarily the burden of proof is upon the party who relies upon a forfeiture, that is, upon the relocater, but when he establishes that no assessment work has been done within the boundaries of the claim, the burden is then shifted upon the other side to produce proof as above.

Whether work done outside of its boundaries is for the benefit of the claim and whether work done on one claim is for the benefit of a series of claims owned in common are questions of fact for determination by the jury. The court may not substitute for this determination its own judgment or opinion as to the expediency of the method or plan adopted for the development of the ground. By the act of Congress of February 12, 1903 (c. 548, 32 St. 825), annual work on oil lands may be done upon any one of a group of contiguous claims owned by the same person not exceeding five claims in all, provided it tends to their development or to determine their oil bearing character.

The work must be done by the owner, by his agent or at his instance, or by some one who holds an equitable or beneficial interest in the property. This includes a stockholder of a corporation owner. There is, however, a presumption that work done was done by the owner.

The state statutes requiring the recording of affidavits of the performance of annual work are generally construed to be directory. Their only effect is to give to the record when made

the effect of *prima facie* evidence of the fact. In California, however, the failure to record is held to throw the land open to relocation. Elsewhere, this failure has no effect except to deprive the locator of the advantage of the evidence, save in Idaho and New Mexico where he is also thereby subjected to the burden of proof. Arizona Rev. St. 1901, §§ 3239-40; Arkansas, Act of May 23, 1901, Kirby's Dig. § 5364; California St. 1891, c. 155, p. 219; Colorado, M. A. S. 3161; Idaho Civ. Code, § 2565; Nevada Comp. Laws 1900, § 217; Oregon, 2 B. & C. Ann. Codes, § 3977; Utah Laws 1899, c. 14, § 6, p. 27; Washington, 3 Bal. Ann. Codes, § 3151a; Wyoming Rev. St. 1899, § 2559.

Persons who enlisted in the volunteer army or navy for service in the war with Spain were excused from doing annual work upon claims owned by them until six months after they were mustered out of service or died in service, by complying with the provisions of the Act of July 2, 1898 (c. 563, 30 Stat. 651).

United States.

Royston v. Miller, 76 Fed. 50 (1896). C. C. D. Nev. Where it is sought to hold several claims owned in common by work done upon one of them, they must be contiguous. A noncontiguous claim cannot be held by such work.

The act of Nov. 3, 1893 (see vol. 1, p. 267), suspended the right to forfeit a co-owner's interest for failure to contribute. I. and S. were the co-owners of several claims. I. had performed the annual work for 1893. S. availed herself of the provisions of the act of Nov. 3, 1893, and complied therewith. I. then followed the provisions of Rev. St. 2324 as to notice and publication, but it was held that S.'s interest was not affected thereby.

Justice Min. Co. v. Barclay, 82 Fed. 554 (1897). C. C. D. Nev. Where the right to hold a claim has been lost by failure to do assessment work, it may be revived by resumption of work before intervening rights by other parties have been acquired. This right of resumption is not defeated by the fact that in the meantime other parties have made locations upon the ground if these locations had been abandoned or forfeited before the resumption of work by the original locator.

"In order to comply with the law, it was not necessary that the assessment work should be done upon the surface of the claim. It may be done on the surface or beneath the surface, and this would be sufficient although it might be that the work was performed on a lode having its apex outside of such surface lines. *Mount Diablo Mill. & Min. Co. v. Callison*, 5 Sawy. 439, Fed. Cas. No. 9886. It may be done on other claims or upon other ground, where, as here, it is in reasonable proximity to it; and if the work, as done, would be beneficial, and tend to the future development or improvement of the claims, it is sufficient. *Doherty v. Morris*, 17 Colo. 105,

28 Pac. 85; *U. S. v. Iron Silver Min. Co.*, 24 Fed. 568. It has always been held by the supreme court that, when several adjoining claims to mineral lands are held in common, work for the benefit of all done upon any one of them in a given year to an amount equal to that required to be done upon all in that year meets the requirements of section 2324, Rev. St."

"Where the work is not done within the surface boundaries of the location, the law undoubtedly casts the burden upon the party claiming to have done the work, not only to show that the work done outside of such boundary was intended as the annual assessment work on the claim, but that it was of such a character as that it would enure to the benefit of such claim. But, when such facts are clearly established, then it is wholly immaterial whether the work to accomplish such purpose was performed off the ground upon a patented or unpatented mining claim. *Hall v. Kearney*, 18 Colo. 505, 509, 33 Pac. 373."

Northmore v. Simmons, 38 C. C. A. 211, 97 Fed. 386 (1899). 9th Circ. Rev. St. 2324, and the amendatory act of January 22, 1880, were intended merely "to prescribe the minimum amount of expenditure in labor or improvements which was exacted by the United States within a maximum period, and to leave the state legislatures or local districts the power to make such reasonable regulations as they might deem advisable, within the prescribed limit; such regulations to be always subject to the provision of the statute that at least the expressed yearly amount in work or improvement must be expended upon the claim, and that, at most, the time for expending the same shall not be extended beyond the designated year." Therefore, a regulation of a mining district requiring certain prescribed work to be done on the claim within ninety days of location, otherwise the claim to be subject to relocation, is valid. *Original Co. of the W. & K. v. Winthrop Min. Co.*, 46 Cal. 631 (see vol. 1, p. 272). disapproved.

Fee v. Durham, 57 C. C. A. 584, 121 Fed. 468 (1903). 8th Circ. A claim was located January 1, 1898. December 26, 1899, the locators began to do their assessment work and with laborers worked continuously during the usual working hours, until Saturday evening, December 30th. At this time \$100 worth of work had not been done, but the tools were left on the ground and work was resumed Monday morning, January 1, and prosecuted until \$500 worth of work had been done. Held that if work had been resumed on December 26th, in good faith and with the intention of perfecting title, a relocation by other parties a few minutes after midnight on the morning of January 1 was void, because in contemplation of law the suspension of work by the owner from Saturday evening to Monday morning did not interrupt the continuity of the owner's possession, and an entry by other parties during that time was a trespass, by which no rights could be acquired. Sanborn C. J., dissenting.

Walton v. Wild Goose Min. & Trading Co., 60 C. C. A. 155, 123 Fed. 209 (1903). 9th Circ. Any labor performed upon the claim, if sufficient in amount, will satisfy the law as to the performance of annual work, if its tendency is to develop the claim as a mine or to discover mineral, such as the digging of prospect holes or cuts or draining ditches.

or the removal of brush, panning, etc. In determining the amount of work done on a claim, the question is not what was paid for the work, nor what the contract price of it was, but what it was reasonably worth, and in considering this question, the distance of the mine from the source of labor, the cost of maintaining the laborers, the current rates of wages, etc., must be regarded. See this case also on page 394.

McCulloch v. Murphy, 125 Fed. 147 (1903). C. C. D. Nev. "The object of the law in requiring annual assessment work to the extent of \$100 on the claim is that the owner shall give substantial evidence of his good faith. A liberal construction must be given to the requirements of the law. The labor and improvements, within the meaning of the statute, should be deemed to be done when the labor is performed or improvements made, for the purpose of working, prospecting or developing the mining ground embraced in the location, or for the purpose of facilitating the extraction or removal of the ore therefrom. * * * The method of proof usually required to establish the fact that the amount of labor for the annual assessment has been done is not uniform. Mere proof of the expenditure of \$100 is not, of itself, sufficient, but it furnishes an element tending strongly to establish the good faith of the owner. One of the main tests of determining this question is not what was paid for it, or the contract price, but whether or not the labor, work, and improvements were reasonably worth the said sum of \$100." A failure to record a certificate of the doing of the assessment work, in accordance with the provisions of the statute of Nevada (1887, p. 136, c. 143), does not work a forfeiture of the claim. The act simply makes the record *prima facie* evidence of the facts therein stated, but the necessary proof may be made in other ways.

Elder v. Horseshoe Min. & Mill. Co., 194 U. S. 248, 48 Law. Ed. 960 (1904), affirming 15 S. D. 124, 87 N. W. 586, 102 Am. St. Rep. 681. A published notice to a co-owner under Rev. St. 2324 is sufficient, if addressed to the co-owner by name "his heirs, administrators and to whom it may concern," although he was dead and there was no administrator of his estate. The statute does not require that the published notice shall be directed to any one by name. "It was not necessary, in our judgment, that the notice should specifically name the heirs of the deceased owner. The act does not require it. If the notice be such that the former owner is particularly named and identified thereby, and his heirs are notified by the publication, it is a sufficient notice to them for the purpose of making it necessary for them to comply with the terms of the statute within the time designated therein by the payment of their share of the expenses of working the mine, or else to lose their right, title and interest therein. The co-owner who did the work might not know who the heirs were, and it might be impossible for him to learn their names or whereabouts, and the statute never contemplated that the man who did the work should be prevented from obtaining the benefit of the statute by his inability to learn who the heirs were and where they lived. A general address to the heirs of the person named and the proper publication of the notice is sufficient. It did not become insufficient because in addition to being addressed to them it was

also addressed to their intestate by name. An address to a deceased person did them no harm, so long as it was also addressed to them."

It is not necessary to publish a notice to lienors; and there is no irregularity in grouping in one notice claims for more than one year's expenditures.

Publication made every day except Sunday, beginning Monday, Jan. 7, 1889, and concluding Tuesday, April 2, 1889, is a publication "once a week for 90 days," as required by the statute. "There was a publication on each Monday from January 7 to April 1, both inclusive. If no publication was required after the first until the following Monday, none was required after April 1 until the following Monday, April 8, and on that day the period of ninety days had been completed. Including the first day of publication, ninety days ended on Saturday, April 6. Excluding the first day, ninety days ended on Sunday April 7. On that day the required notice had continued during ninety days, and another publication on Monday, April 8, was wholly unnecessary."

Whalen Consol. Copper Min. Co. v. Whalen, 127 Fed. 611 (1904). C. C. D. Nev. In computing the value of assessment work, the amount of money actually paid is not the only criterion. It is an important factor, is admissible in evidence and tends to show good faith. In addition to the amount paid to laborers, there may be included and considered as part of the expenditure on the claim the cost of sending them there, and of tools, freight and hauling.

Willitt v. Baker, 133 Fed. 937 (1904). C. C. W. D. Ark. Where the locators of a mining claim were doing work upon the claim on December 31, 1900, and left their tools that evening in a cut intending to return next day and resume work at the usual time, the claim was not abandoned, and another person attempting to locate a claim thereon at 2 A. M. on January 1, 1901, was in law a trespasser. The original locators were as much at work upon the claim at that time as if they had been actually in the cut using the tools.

The burden of proof is upon the party setting up a forfeiture by reason of failure to perform annual work. See this case also on pages 404 and 446.

Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co., 133 Fed. 838 (1905). C. C. D. Or. A. S. and M. were the joint owners of a claim, and M. did not contribute to the assessment work for 1898. On Jan. 14, 1899, A. and S. conveyed their interest to the Stockton Co., of which they owned practically all the stock. Proceedings were taken to forfeit M.'s interest under R. S. 2324, the notice which was dated July 28, 1899, being signed by A., S. and the corporation. This was attacked on the ground that at that date A. and S. had parted with their interests in the claim, and when the work was done the company was not an owner. The notice was held to be sufficient under the facts. The court saw no reason why the right to forfeit was not assignable, but left that question undecided.

Wallis v. Davies, 158 Fed. 667 (1907), C. C. D. Nev., affirmed 164 Fed. 397 (1908). 9th Circ. The statute does not require any particular character of work. Whether it is judiciously done, how it is performed, whether it is beneficial, is immaterial. The character of the work becomes material only when it is performed outside the boundaries of the claim. Then it must tend to the development or improvement of the claim for which it is designed.

"The federal act in relation to the performance of annual labor says nothing as to the person by whom it shall be performed. The obvious purpose of the law is to exact work as an evidence of good faith on the part of the owner, and also to discourage the holding of mining claims without development or intention to develop, to the exclusion of others who could and would improve such ground if they had opportunity. Manifestly, the annual work must be performed by the owner, at his instance, by some one in privity with him, or by some one who holds an equitable or beneficial interest in the property. Work by such a person will inure to the benefit of the claim." "A stockholder in a mining company has such a beneficial interest in the corporate property that any mining work done by him on the unpatented claims of the company must be counted as representation work."

Knickerbocker v. Halla, 162 Fed. 318 (1908). 9th Circ. In an action of ejectment for an undivided interest in a mining claim, where the defendant sets up a forfeiture by the plaintiff for failure to contribute his proportion of expenditure for annual work, and plaintiff offers evidence that he had himself done the work, a question of fact is raised which must be submitted to the jury.

Van Sice v. Ibez Min. Co., 173 Fed. 895 (1909). 8th Circ. The provision of Rev. St. 2324 for the forfeiture of the interest of a co-owner for failure to contribute his proportion of expenditures for annual work is constitutional. This section is part of the very law upon which the co-owner is compelled to rely for the source of his title, for the existence of any right whatever. He cannot claim a vested interest freed from the statutory conditions which qualify it.

Where the owners of the remaining interests have conveyed them to a trustee upon an adjustment of conflicting claims, they retain the beneficial ownership, and a notice signed by them is sufficient under the statute.

Knickerbocker v. Halla, 177 Fed. 172 (1910). 9th Circ. Where one of several co-owners conveys to a stranger an undivided interest in the claim in consideration of the performance by him of the annual work for a certain year, the latter has no right to claim contribution from the other owners or to give notice of forfeiture. The publication of notice under Rev. St. 2324 is a waiver of a prior personal notice, and a tender of contribution within 90 days after the date of the last publication is in time and sufficient to prevent forfeiture. One co-owner may make a tender on behalf of another. In such a case an agency is implied, and if no objection is made on the ground of want of authority, the right to urge it thereafter is waived.

Arizona.

Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197 (1898). If the work be not completed within the year in which the statute requires it to be done, but the owner is upon the ground for the purpose of doing the work before the year expires, and then prosecutes the work to completion, it will have relation to the year in which it should have been done, and such resumption will prevent a forfeiture. Even if he resumes work after the expiration of the year, but before other rights attach in favor of relocators, he preserves his claim. See this case also on page 372.

Kinsley v. New Vulture Min. Co., 90 Pac. 438 (1907). "Where a keeper is maintained simply to comply with the law relative to assessment work and to hold the property without any intent within a reasonable time to make use for the purpose of mining of such structures as there may be thereon and which he is employed to care for, such expenditure should not be counted as assessment work. The expenditure, to count as assessment work, must be made in good faith, and it must reasonably be of present use and benefit to the property as a mine by guarding valuable improvements made therein or thereon against deterioration or destruction, when such improvements may reasonably be said to be of value to the property as a mine." The reasonable necessity for the employment of such keeper, in view of the situation and condition of the property and its operation in the future, is one of fact.

Arkansas.

Woody v. Bernard, 69 Ark. 579, 65 S. W. 100 (1901). A local regulation providing that 20 days' work shall be deemed to be worth \$100, and therefore a compliance with Rev. St. 2324, is invalid. The work must actually be of the value of \$100, and not merely counted as such by an arbitrary rate established by a local mining association.

Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87 (1902). "If an original locator, his heirs or assigns, should fail to perform work in any year, and should thereafter resume work, in good faith, before any relocation is made, he thereby preserves his right to the claim. His rights then stand as they would if there had been no failure to comply with this condition of the law, and no one has a right to relocate upon the land covered by his claim after such resumption of work in good faith."

Worthen v. Sidway, 72 Ark. 215, 79 S. W. 777 (1904). Although a locator fails to perform his annual assessment work, if he thereafter and before any other person makes a valid relocation, resumes work in good faith and prosecutes it with reasonable diligence until the requirement for annual labor is satisfied, he thereby prevents a forfeiture of his claim.

California.

Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047 (1896). Where a mine is idle, the services of a watch-

man may constitute work if such care is necessary to preserve tunnels, buildings or any structures erected to work the mine, but not if there was only the naked claim to be looked after.

The fact that several locations are not contiguous would not necessarily prevent annual work done on one from inuring to the benefit of all. "Mines may be conceived of as so situated that the same work may be and appears to be expended in opening or developing both mines, although they are not actually contiguous." This view is contrary to the general holding.

Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708 (1897). The Act of March 31, 1891 (St. 1891, p. 219), which provides for filing an affidavit describing the labor performed, gives 30 days after the time within which the labor is to be performed within which to file the affidavit, and the ground is not open to relocation until after the expiration of said 30 days.

Mann v. Budlong, 129 Cal. 577, 62 Pac. 120 (1900). Where a person locates a mining claim, and owns a contiguous and overlapping claim, and drives tunnels on the land common to both claims for the bona fide purpose of tapping both of them, a strict compliance with the requisites of the statute is established, and a court will not be permitted to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine in place of that of the owner.

Wright v. Killian, 132 Cal. 56, 64 Pac. 98 (1901). Where the owner of a mining claim pays a contractor \$100 to do the assessment work on the claim, and the latter does work which he and others testify was reasonably worth \$100, and the good faith of the owner is unquestioned, a finding by the trial court that \$100 worth of work was done will be sustained although there was other evidence that the work done was not worth \$100. A rule of a mining district will not dispense with the requirement of the federal statute; but it is evidence as showing what amount of work the miners in that district considered worth \$100.

Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036 (1901), reversing 123 Cal. 268, 60 Pac. 774. Where no assessment work was done on a claim for the year 1898, but on December 30, 1898, the locators sent a man who worked on the 31st, rested on January 1st, 1899, because it was Sunday, and then continued working until he and another man had done over \$100 worth of work, held that the claim was not open to relocation on January 1, 1899, for the reason that the original locators, having failed to perform their assessment work for 1898, had resumed work thereafter and before such relocation. The court will decree a forfeiture only upon clear and convincing proof adduced by the party who asserts the forfeiture. Affirmed in *Yosemite G. M. & M. Co. v. Emerson*, 208 U. S. 25, on the ground that no denial of a federal right was set up by the party claiming the right to relocate.

Yreka Min. & Mill. Co. v. Knight, 133 Cal. 544, 65 Pac. 1091 (1901). Whether work done on one of two contiguous claims owned by the same person is for the benefit of both claims is a question of fact to be determined by the jury.

Temescal Oil Min. & Development Co. v. Salcido, 137 Cal. 211, 69 Pac. 1010 (1902). In 1900 plaintiff located its claim on ground located by defendant in 1896. The latter did his annual work for 1899, and also that for 1900, before plaintiff completed his location. The court instructed the jury that it was of no importance whether the defendant had failed to work his claim in any previous year because the plaintiff made no claim to the premises at any time prior to 1899. Held not to be error. In the absence of evidence to the contrary, it will be presumed that the work was done for the honest purpose of resuming "after failure and before location." Failure to do work in previous years does not tend to show the absence of good faith in the resumption.

Hough v. Hunt, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17 (1902). Money paid to a man who lives in a house on a claim, and is alleged to be a caretaker of the property on the claim, cannot be considered in determining whether a locator has done the required amount of assessment work. "There may be cases where work has been temporarily suspended, and there are structures which are likely to be lost if not cared for, and it appears that the structures will be required when work is resumed, and that the parties do intend to resume work, in which money expended to preserve the structures will be on the same basis as money expended to create them anew. But this could not go on indefinitely. As soon as it should appear that this was done merely to comply with the law, and to hold the property without any intent to make use of such structures within a reasonable period, such expenditure could not be said to have been made in work upon the mine."

Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261 (1904). The fact that a cotenant does not contribute to the assessment work done does not deprive him of his interest in the mine, or transfer his interest to his cotenant. The latter must protect himself under the provisions of Rev. St. 2324.

Southern Cross Gold Min. Co. v. Saxton, 147 Cal. 758, 82 Pac. 423 (1905). After application for patent and the issuance of receiver's receipt and pending the issuance of patent, a mining claim may not be forfeited for the nonperformance of annual work.

Anderson v. Caughey, 3 Cal. App. 22, 84 Pac. 223 (1906). The value of annual work is not determined by its cost but by what it is reasonably worth. It may have all been contributed gratuitously and would still constitute assessment work under the law. A locator has all of the succeeding calendar year in which to do his annual work.

Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600 (1906). If work has been actually done in good faith for the purpose of developing the mine and compliance with the statute is established, a court will not be permitted to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine in place of the owner's judgment. Services of watchmen to warn off other prospectors are not allowed as part of assessment work.

Madison v. Octave Oil Co., 154 Cal. 768, 99 Pac. 176 (1908). A failure to do the assessment work does not create a forfeiture in favor of one occupying the claim by adverse possession. "The statute which requires that 'one hundred dollars' worth of labor shall be performed or improvements made' declares that 'upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after such failure and before such location.' It is not provided that a mere failure to comply with the statutory requirement shall terminate the locator's right; the sole effect of such failure is to throw the land open to location by others, and, in the absence of such other location, the original claimant's right to resume work and to hold his claim remains." The right of the original claimant is terminated only by the entry of a new one, entering peaceably for the purpose of relocation.

Colorado.

Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389 (1902). Assessment work can be performed on one claim for the benefit of several when there is a community of interest in all the claims for the benefit of which such work is done.

The annual labor may be performed outside a mining claim if it is intended for and inures to the benefit of the claim.

Although the burden of proving forfeiture is on the party setting it up, yet, if it appear that the assessment work was done outside of the claim, the burden is then shifted to the owner to show that the work done was intended to be assessment work for the claim and tended actually and directly to its development.

Field v. Tanner, 32 Colo. 278, 75 Pac. 916 (1904). Under the act of Congress of July 2, 1898, c. 563, 30 U. S. Stat. 651 (U. S. Comp. St. 1901, p. 1428), providing that mining claims owned by any person who enlisted for service in the war with Spain should not be subject to forfeiture for nonperformance of the annual assessment work until six months after his death in service or after being mustered out of service, and providing further that persons desiring to take advantage of this act should file a notice in the clerk's office where the location certificate of the mine was recorded, giving notice of their desire to hold the claim under this act, an enlisted person, being an owner of a claim, which has been regularly located and recorded, who files or causes to be filed in the proper clerk's office the notice provided for by the act, is relieved of the necessity of doing the annual assessment work, and the filing of such notice is equivalent in all respects to, and is attended with the same consequences that result from, its actual performance.

Haynes v. Briscoe, 29 Colo. 137, 67 Pac. 156 (1901). Where a notice to a co-owner of the forfeiture of his interest for failure to contribute refers

to two claims, it is defective if it does not specify the amount of money spent on each or state facts which might excuse expenditure on each. Such a notice will not support a forfeiture. Quere, whether the requirement of publication in the newspaper nearest the claim is satisfied by publication in that which is nearest by the usual traveled route?

McCormick v. Parriott, 33 Colo. 382, 80 Pac. 1044 (1905). The amount paid for assessment work is admissible in evidence as bearing upon its value. In determining the value of the work done, however, the reasonable value thereof, and not the price thereof, must govern.

Hain v. Mattes, 34 Colo. 345, 83 Pac. 127 (1905). Under the provision of Rev. St. 2324, as amended by the act of Feb. 11, 1875, by which money expended on a tunnel to develop a lode or lodes shall be considered as expended on such lode or lodes, it is not necessary that the work be done within the boundaries of the claim. The work may be done in a tunnel off the claim, if such tunnel is driven for the purpose of developing the claim. This is true, regardless of the contiguity or noncontiguity of the territory at the portal of the tunnel to the claim sought to be developed; and where the portal of the tunnel is not on the claim to be developed or on a contiguous claim, it is not necessary that the owner of the claim to be developed should own a continuous strip of ground from the portal of the tunnel to the exterior boundaries of the claim through which it is proposed to drive the tunnel.

Ballard v. Golob, 34 Colo. 417, 83 Pac. 376 (1905). In proceedings to forfeit the interest of co-owners, under the terms of Rev. St. 2324, no co-owner can be divested of his interest if his name does not appear in the notice required by the statute.

Montana.

Ristic v. Morton, 20 Mont. 139, 49 Pac. 656 (1897). Where the interest of a co-owner has been forfeited for failure to contribute under Rev. St. 2324, the law does not require that the record should show that the publication of notice was made and that the defaulting co-owner had not contributed his part in labor or money to represent the claim for the year in question. It is only necessary that the party applying for a patent should be prepared to prove these things in the land office. A purchaser of the unpatented claim cannot object to the title on the ground that these matters do not appear of record.

Power v. Sla, 24 Mont. 243, 61 Pac. 468 (1900). The assessment work required by Rev. St. 2324 may be performed either in labor or improvements put upon the claim. Therefore, an allegation that an applicant for a patent had not complied with this statute is insufficient, if it alleges merely that the applicant had not done any "work or labor" on the claim in question; it should negative also the making of "improvements." The terms "work" and "labor" are not synonymous with the term "improvements." The former have reference to prospecting and excavating for the purpose of development; while the latter, though comprehensive enough

to include everything signified by the former, has reference also to tangible, material additions to the claim in the way of machinery, buildings, and other structures put in place or created for the purpose of developing the property and extracting minerals contained in it.

Penn v. Oldhauber, 24 Mont. 287, 61 Pac. 649 (1900). A custom of a mining district that 20 day's work satisfied the requirements of Rev. St. 2324 conflicts with that section and is invalid.

McKay v. McDougall, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395 (1901). See this case on page 375.

Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833 (1904). The purpose of the annual assessment work is to enable the locator to hold his claim as against all persons; it is not required for any purpose which affects the general government. The government cannot forfeit the claim if the annual representation has not been placed upon it. In order to make the want of annual representation effective, the ground must be entered and located by another person. A void location subsequently made by another person does not allow him to raise the question as to the sufficiency of the prior locator's representation work. See this case also under chap. XIV, div. II.

Delmoe v. Long, 35 Mont. 139, 88 Pac. 778 (1907). Proceedings having been taken under Rev. St. 2324 by one of two co-owners to forfeit the interest of the other, it was subsequently shown that no assessment work at all had been done by the former. It was therefore held that the proceedings taken by him were of no effect, and the issuance of a patent to him to the exclusion of his co-owner was not conclusive. The statute, being one of forfeiture, must be strictly construed.

Copper Mountain Min. & Smelting Co. v. Butte & Corbin Con. Copper & Silver Min. Co., 39 Mont. 487, 104 Pac. 540 (1909). While it is now well settled that annual work may be done upon one of a group of contiguous claims, provided it is done for the purpose of developing them and facilitating the extraction of ore therefrom, yet, if the work done on one claim has no reference to the other claims in a group or does not tend to develop all of them in conformity with a general plan adopted with that purpose in view, it cannot be considered as work done upon them as a group. "If the work is not a part of a general plan having in view the development of the group or consolidated claim, so that the ore may be more readily extracted and the work has no reasonable adaptation to that end, then no matter what the amount of it is, it cannot be said to have been done in the development of the group. In such cases it is usually a question of fact for the court or jury, as the case may be, to say upon the evidence whether the requirements of the law have been met."

While the burden of proof is on the party alleging a forfeiture, yet, if it be shown that the annual work was not done upon all of the claims, but only upon one for the alleged benefit of all, the burden shifts to the other party to show that the work was adapted to the development of all the claims and was intended for that purpose.

It was contended that if it appeared that the work was done in good faith for the purpose of developing the group of claims, the court should not be permitted to substitute its own judgment as to the wisdom or expediency of the method employed in adopting the plan pursued. This is correct as an abstract proposition. "Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which it bears to the claim itself. If the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in its pursuit be conceded."

Nevada.

Nesbitt v. DeLamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 77 Am. St. Rep. 807 (1898). It was the intention of congress in passing the special acts of 1893 and 1894, suspending the requirements of Rev. St. 2324, as to annual labor, that the recording of the prescribed notice should have the same legal effect as performing the labor. It is not necessary that "the claimant or claimants" authorized to secure the benefit of said acts should have valid title to the ground claimed. Rehearing denied 24 Nev. 273, 53 Pac. 178 (1898).

Sisson v. Sommers, 24 Nev. 379, 55 Pac. 829 (1899). The statute of Nevada of 1897, p. 103, which requires a locator, within 90 days from posting notice of his claim, to sink a discovery shaft of a certain depth in order to show a lode deposit of mineral in place, is not in conflict with the act of Congress (Rev. St. 2324) giving a locator one year to do \$100 worth of labor on the claim. A state legislature may not only require a locator in order to hold his claim to do more labor than that required by the act of congress, but it may also require him to do it in a less time. "The congressional law * * * clearly implies that the states and territories may require a reasonable amount of work to be done within a reasonable time after location independently of the annual assessment work prescribed by Congress."

New Mexico.

Eberle v. Carmichael, 8 N. M. 169, 42 Pac. 95 (1895). A., B. and C. agreed that A. and B. would prospect for and locate mines, which should be owned in common by the three and C. would furnish the means to develop and hold the same. Three claims were located, one in the name of A., one in the name of B., and one in the name of C. It was held that these three claims were held in common and were within the rule that work done upon one which tended to develop all was sufficient to hold all. This conclusion is not affected by the statute requiring the names of locators to be recorded, that being subordinate to the act of congress.

"The only attack made upon the validity of the location which appears to be strongly pressed is that the names of three persons claiming an in-

terest in each mine located should have appeared on each location notice. As to this, however, it is replied that in our opinion the legal title was in the locator named for each mine, but the others had such interest with him as constituted, under the mining laws, a holding in common to the extent at least of making work done for development of the three satisfy the law if sufficient in quantity and value. It makes no difference whether the interest of the one other than the locator be inchoate or equitable. The statute in reference to co-owners does not, we believe, necessarily mean those who are vested with the legal title." *Book v. Justice Min. Co.*, 58 Fed. 106 (see vol. 1, p. 271), followed.

Upton v. Santa Rita Min. Co., 14 N. M. 96, 89 Pac. 275 (1907). One who has acquired right of possession to a mining claim under the statute of limitations, in accordance with Rev. St. 2332, is not relieved from the obligation of thereafter performing annual work. The claim may be subsequently forfeited and rendered subject to relocation by failure to perform such work.

Forfeiture for failure to perform annual work can be established only by clear and convincing proof of such default by the party setting up the forfeiture. Where, however, the owner has failed to file proof of labor, as required by Comp. Laws of New Mexico, § 2315, he may not invoke this rule, since that section places the burden upon him to prove that the work has been done.

Oregon.

Bishop v. Baisley, 28 Or. 119, 41 Pac. 936 (1895). "A mining claim subsequent to a valid location is property in the highest sense of the term. It may be bought and sold and will pass by descent * * * The right is a valuable one and is protected by law." A forfeiture for failure to do annual work cannot be taken advantage of unless it is specially pleaded. Under Oregon practice, however, where technical forms of pleading the forfeiture, and it is not necessary to add that thereby the claim became forfeited.

ing are abolished, it is only necessary to set forth the facts that constitute

The word "prospecting" when used with reference to work that may be included as annual labor "is not used in the sense of 'exploration and discovery' which is necessary before a valid location can be made, but rather in the sense of 'development and demonstration' that the value of the ledge may be determined, as distinguished from the ascertainment of its existence. Now the question recurs whether picking rock from the walls of a shaft, or from the side or outcroppings of a ledge, in small quantities from day to day, making tests for the purpose of sampling it, breaking and examining it under a glass, crushing it in a mortar and panning it out and carrying it away and making assays of it, in attempting to find the 'pay chute' as it is termed, is such as the law will permit the claimant to be credited with upon his account for annual labor performed. Such labor does not add to the value of the claim, nor does it tend to the development

of the mine. Five hundred dollars worth of labor of this nature could easily be expended and yet the surveyor general would not be able to certify from an inspection of the mine that it had been done." Such work leads one to question the good faith of claimant and is not such as the statute contemplates.

Where a locator has failed to do annual work, entering one of the shafts and spending an hour or so with a pick and hammer securing samples of ore is not a resumption of work.

Crown Point Gold Min. Co. v. Crismon, 39 Or. 364, 65 Pac. 87 (1901). The right to a claim on which assessment work has not been done in one year may be revived by the doing of the required annual work in a subsequent year, if done before relocation. Where the owner of a claim sends a man to perform the annual assessment work, and the man testifies that he worked for 20 days, and that the reasonable value of a day's work was \$5, and there is further evidence that a tunnel on the claim was driven 20 feet and that it is worth \$5 a foot to drive a tunnel, a court is justified in finding that the claim was not forfeited, although the man who did the work could not itemize what he had done, and persons who inspected the claim testified that he did little, if any, work.

Wagner v. Dorris, 43 Or. 392, 73 Pac. 318 (1903). In considering whether the necessary assessment work was done on a claim, the amount paid to the men doing the work is immaterial; the question is, what was the value of the work which they did.

Fredricks v. Klauscr, 52 Or. 110, 96 Pac. 679 (1908). Excepting the year when a location is made, there must annually be expended not less than \$100 in labor or improvements upon each unpatented mining claim located after May 10, 1872. Where, however, two or more contiguous claims are held in common, such expenditure may be made upon one claim. The word "improvement" as thus used evidently means such an artificial change of the physical conditions of the earth in, upon, or so reasonably near a mining claim as to evidence a design to discover mineral therein or to facilitate its extraction, and in all cases the alteration must be reasonably permanent in character.

If horses had been used in a tunnel to draw cars or employed at a shaft to raise ore, the reasonable compensation for their daily service might be treated as labor performed, but the sum of money paid for their purchase cannot be viewed as an expenditure incurred in the development of a mining claim.

Cutlery, dishes, tinware, groceries, provisions, tobacco, bedclothing, do not constitute an improvement of a mining claim, though candles, powder, fuse, etc., used in development work, will be estimated in determining the value of the work. A compensation for the use of tools, but not their purchase price, may be included in the value. Evidence showing that a locator of a group of four mining claims made improvements on one claim during a year at a legitimate expense of \$132 prevented a forfeiture of such claim, but not of the other three.

South Dakota.

Axiom Min. Co. v. White, 10 S. D. 198, 72 N. W. 462 (1897). Under Rev. St. 2324, contiguous claims held in common are treated as entireties, and an expenditure of an amount equal to one hundred dollars for each may be made upon one or more of such claims, provided such expenditure tends to the development of the property as a whole.

Godfrey v. Faust, 18 S. D. 567, 101 N. W. 718 (1904). Where the superintendent of a company has a contract for the purchase of a mining claim, which he holds under an implied trust for the company, and the company, being in possession of the claim, does the annual assessment work thereon, such work inures to the benefit of the owner of the claim.

Godfrey v. Faust, 20 S. D. 203, 105 N. W. 400 (1905). To render work outside the boundaries of a mining claim available as annual work thereon, it is only necessary that it be within reasonable proximity thereto, and done for the purpose of its development; this covers the construction of a tunnel on property outside of a mining claim made solely with reference to the development of the claim.

Gurcey v. Elder, 21 S. D. 77, 109 N. W. 508, 130 Am. St. Rep. 704 (1906). A. caused the servant of the locator of a mining claim to leave the claim while engaged in doing the assessment work by threatening him with arrest if he continued at work. A. then took exclusive possession of the claim, retained possession, and by force and threats of violence prevented the servant from continuing work, at the same time making a pretended location. In a suit on an adverse claim by A. against the original locator, A. set up that the claim was open to location by him, the assessment work not having been done by the senior locator. Held that no man can take advantage of his own wrong. A. was an intruder and trespasser with actual knowledge of the locator's possession, and as such could not initiate any rights which will defeat those of the prior locator. Nor was the servant bound to persist in his efforts to work until prevented by apprehension of imminent physical violence.

Hawgood v. Emery, 22 S. D. 573, 119 N. W. 177 (1909). Where a person or persons hold several claims that are adjacent, work can be done on one claim and be credited on the other claims; also work can be done outside of the limits of the claim and credited on such claim where such work is beneficial to the claim, and this is true even if there are several claims upon which credit is asked for outside work, provided they are held in common. Also where there are several adjacent claims held by different persons and work beneficial to all of the claims can best be done on one of them, then under a proper agreement between the owners thereof development work can all be done on one claim and be credited to the several claims, such work being a part of a general plan or scheme for the development of the several claims.

But one cotenant of mining claims cannot, regardless of the wishes of his cotenant, do work upon his individual adjacent claim beneficial to the same and afterwards recover from his cotenant therefor on the theory that

his cotenant was benefited, especially where there was no agreement or understanding in existence under which the cotenant had any rights in such adjacent claim. Hence such work by the one cotenant on his own property could not be credited as work on the adjacent property owned in common unless it was part of the general scheme for the development of the various claims agreed to between the owners.

Utah.

Wilson v. Triumph Consol. Min. Co., 19 Utah, 66, 56 Pac. 300, 75 Am. St. Rep. 718 (1899). Where the testimony tends to show the consolidation of a group of claims for development and working purposes, and that the required amount of work was done on one claim for all, and that defendant's grantor was the owner of all the claims by location or assignment, the question of whether work on one would inure to the benefit of all is properly left to the jury.

Kloppstine v. Hays, 20 Utah, 45, 57 Pac. 712 (1899). Although the owner of a mining claim, originally valid, has failed in his assessment work, so that the ground is open to relocation, yet if before any valid relocation is made by others, or after the abandonment of a valid relocation, the original locator or his grantee resumes possession, and does the necessary work, his rights are revived under the original location. Assessment work for a mining claim may be done on an adjoining claim, where it is shown that it was intended for the former claim, and that the work done would inure to its benefit.

Fissure Min. Co. v. Old Susan Min. Co., 22 Utah, 438, 63 Pac. 587 (1900). Where the testimony tends to show that respondent's mining claims were consolidated for development and working purposes, that work on the tunnel and shafts was done to apply on the respective claims, that respondent had an interest in all of these claims, and that the development work was a benefit to all the claims, the testimony is sufficient to sustain the finding that the work done in the tunnel and shafts was beneficial to respondent's claims, under the provisions of Rev. St. 2324. See this case also under chap. XV, div. IV.

Murray Hill Min. & Mill. Co. v. Havenor, 24 Utah, 73, 66 Pac. 762 (1901). If assessment work is actually done, the failure to file an affidavit of the fact as required by the state law (Utah Rev. St. § 1500) does not render the claim subject to relocation. A valid location can be forfeited only by a failure to comply with the condition mentioned in the act of congress.

Washington.

Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123 (1902). Where it is shown that assessment work on a claim was done in a certain year, the presumption is, in the absence of evidence to the contrary, that it was done by the owner of the claim.

Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817 (1905). The test for determining the value of the work done upon a claim is the reason-

able value of the work, not what was paid for it or what the contract price was. While the rate of wages and the cost of the work are strong elements in establishing value, these elements are not conclusive thereof.

Protective Min. Co. v. Forest City Min. Co., 51 Wash. 643, 99 Pac. 1033 (1909). Payment of \$500 to persons employed in good faith to perform assessment work is insufficient to prevent a forfeiture for nonperformance of such work, where such persons did not do anything more than go upon the ground and make a pretense of working. "The work must be done as required in the federal statutes or a forfeiture results."

Sexton v. Washington Min. & Mill. Co., 55 Wash. 380, 104 Pac. 614 (1909). Money expended upon the construction of a road outside of the boundaries of a mining claim, which provides access to the claim and others contiguous thereto, and is built for the benefit of mines and mining claims in the district, may be credited as assessment work on such claim.

Section 14, Laws 1899, c. 45, p. 73, applies only to organized mining districts. While the procedure provided therein may be exclusive in such districts, it is not necessary that it should be followed elsewhere in order that road building may be applicable as assessment work.

Wyoming.

Sherlock v. Leighton, 9 Wyo. 297, 63 Pac. 580, 63 Pac. 934 (1901). "The party relying upon a forfeiture must allege and prove it, and the burden of proof in the first instance rests upon him to establish the forfeiture. When, however, such party shows that no work was performed within the limits of the claim, he makes out a prima facie case; and thereafter should his adversary depend upon labor done outside the claim, the burden is cast upon him of proving the performance of such labor, and that its reasonable tendency is the benefit of the claim."

LAND OFFICE DECISIONS.

Gramplan Lode, 1 L. D. 544 (see vol. 1, p. 279), is overruled by *Thomas v. Elling*, 25 L. D. 495 (1897). See chap. XIV, div. II.

The performance of annual work is not a condition of obtaining patent, but of continued right of possession against others. *Hughes v. Ochsner*, 27 L. D. 396 (1898).

"The doing of annual assessment work is not a condition of obtaining patent, but only a condition of the continued right of possession to an unpatented claim as against other and adverse claimants, and a failure to perform such work furnishes no argument for the cancellation of an entry, in the absence of an adverse claim legally asserted." *McEvoy v. Megginson*, 29 L. D. 164 (1899).

A protest filed by one who has failed to file an adverse claim and containing allegations of adverse ownership and failure to perform annual work presents no question for the consideration of the department. The allegation of adverse ownership has no other effect than to give the pro-

testant a status under the rules of practice somewhat different from that of one who alleges no interest, in that he is accorded appeal as a matter of right. The performance of annual work is not a condition of obtaining patent. *Opie v. Auburn Gold Min. & Mill. Co.*, 29 L. D. 230 (1899).

Annual work is solely a matter between rival claimants to the same land and goes only to the right of possession, the determination of which is committed to the courts and not to the land department. "Where the required expenditure of \$500 has been made upon a mining claim, failure to perform annual assessment work will not in itself prevent the issuance of patent or furnish any ground of protest against the allowance of a mineral entry." *P. Wolenberg*, 29 L. D. 302 (1899); *Belk v. Nickerson*, 29 L. D. 662 (1900); *Marburg Lode Min. Claim*, 30 L. D. 202 (1900).

A failure to do annual work cannot be taken advantage of by an agricultural claimant, but only by a mineral claimant who, after such failure and before resumption of work, relocates the land. *Coleman v. McKenzie*, 29 L. D. 359 (1899).

The performance of annual work is not a condition of obtaining patent. "A failure to perform the annual assessment work upon a mining claim does not ipso facto work a forfeiture of the claim but only subjects it to relocation thereafter and before the claimant resumes work. But the necessity for the performance of such annual assessment work ceases when the purchase price is paid and mineral entry allowed." "The entry of a mining claim properly allowed, therefore, as effectively terminates the right to relocate the claim because of failure to do the annual assessment work thereon as would the resumption of work by a claimant in a case where entry had not been made." *Nielson v. Champagne Min. & Mill. Co.*, 29 L. D. 491 (1900).

A co-owner who is entitled under Rev. St. 2324 to succeed to the interest of his delinquent co-owner does not lose that right by the sale of his own interest in the claim before the completion of the proceedings begun by him under that section. *Chas. H. Emerson*, 29 L. D. 611 (1900).

"An applicant for patent who has been adversely in the courts is not obliged, after the commencement of the adverse proceedings, to keep up the annual expenditure under section 2324, in order to prevent the relocation and probable loss of his claim during the pendency of such proceedings." This follows from the provision in the statute (Rev. St. 2326) by which the successful party is entitled to a patent, upon filing a copy of the judgment roll and the required proofs and upon the payment of the proper fees "without giving further notice." *Marburg Lode Min. Claim*, 30 L. D. 202 (1900).

The provisions for forfeiture in Rev. St. 2324 should be strictly construed. A co-owner who has not made the required expenditure is not within its terms and is not in a position to take advantage of its forfeiture provisions. Where the published notice showed that the amount expended was less than the amount required to hold the claims, no forfeiture accrued. *Golden & Cord Lode Min. Claims*, 31 L. D. 178 (1901).

Questions as to the performance of annual work and as to alleged relocations made by reason of failure to do such work are not for determination by the land department but by the courts. *Cleveland v. Eureka No. 1 Gold Min. & Mill. Co.*, 31 L. D. 69 (1901).

The interest of a co-owner, which may be acquired under the forfeiture provisions of Rev. St. 2324, is the share or interest of such co-owner in the purely possessory rights under the location, and not in any rights arising under an application for patent. A co-owner who has been omitted from an application for patent cannot, by subsequent recourse to forfeiture proceedings against the applicant, acquire any right in himself to make entry under the application. *Surprise Fraction & Other Lode Claims*, 32 L. D. 93 (1903).

The provisions of Rev. St. 2324, relating to the forfeiture of the interest of a co-owner, are not available to one who has no title or ownership in the claim. Proceedings taken by a stockholder of a corporation which was the owner of part of a claim are not effective to divest the interest of the co-owner. *Repeater & Other Lode Claims*, 35 L. D. 54 (1906).

CHAPTER X.

LOCAL MINING RULES AND REGULATIONS.

p. 280. Since the statutes of most of the public land states now cover the subjects previously regulated by miners' rules, these rules have been largely superseded by the statutes. And the subject has therefore become relatively unimportant.

By act of Congress of June 6, 1900 (31 Stat. 321, §§ 15 and 26), miners in any organized mining district in Alaska may make rules and regulations governing the recording of notices of location, water rights, flumes, ditches, mill sites and affidavits of labor; and the location of claims is made subject to rules theretofore made as well as to those thereafter made. Nevertheless, it seems that not only have the miners of Alaska failed for the most part to avail themselves of this permission, but the early codes of district regulation have fallen into disuse. (See "Placer Mining Law in Alaska" by Thomas R. Shepard in 7 Yale L. J. 533.)

United States.

Meyâcnbauer v. Stevens, 78 Fed. 787 (1897). D. C. D. Alaska. Local rules and regulations of miners, although recognized by the mineral laws of the United States, are not subjects of judicial notice.

Butte City Water Co. v. Baker, 196 U. S. 119, 49 Law. Ed. 409 (1905). See this case on page 285.

Alaska.

Butler v. Good Enough Min. Co., 1 Alaska, 246 (1901). A rule adopted by a mining district prior to June 6, 1900, providing that notices of location must be filed for record within 30 days from the date of location, is in conflict with § 15 of the Political Code of Alaska (Act June 6, 1900, c. 786, 31 Stat. 327), which allows 90 days from the date of the discovery of the claim in which to file notices of location for record, and is therefore repealed by it.

Price v. McIntosh, 1 Alaska, 286 (1901). A rule that placer claims shall measure 1,320 feet by 660 feet will not be enforced by the courts. It is unreasonable and conflicts with the provisions of the act of congress. A

miner may locate 20 acres, or less, if he desires, of placer mining ground in any form he chooses, excluding known nonmineral land; no miners' rule, regulation, or custom can limit him in the area or form of his claim, nor in its width or length. This case was affirmed in *McIntosh v. Price*, 121 Fed. 716, in which it was found unnecessary to consider the above point. See page 328, above.

Arkansas.

Woody v. Bernard, 69 Ark. 579, 65 S. W. 100 (1901). A local regulation which provides that twenty days' work shall be deemed to be worth \$100, and therefore a compliance with Rev. St. 2324, is invalid. The labor must actually be of the value of \$100 and not merely be counted as such by an arbitrary rate established by a local miners' meeting.

California.

Argonaut Min. Co. v. Kennedy Min. & Mill. Co., 131 Cal. 15, 63 Pac. 148, 82 Am. St. Rep. 317 (1900). "We have many graphic accounts of the rush of gold hunters to California in 1849. The river banks and gulches were suddenly crowded with eager and earnest men anxious to dig for gold. There was no law by which any one could secure to himself any portion of the rich placers. In the absence of regulation, the strongest or most unscrupulous would get the lion's share. The miners, of necessity, made and enforced their own laws. Some regulations as to mining claims sprung into existence naturally, in fact necessarily: 1. So far as possible, each person was given a specified portion of the ground, which he could mine. 2. The allotment to each was so limited that there could be no monopoly. So far as possible, all should have an equal chance. The right of the first possessor was preferred, but no matter was considered more important than the limitation upon the extent of the claims, and 3. As a corollary from these two cardinal rules, the third follows: That each claimant shall mark plainly upon the surface of the earth the boundaries of his claim, that others may locate claims without interfering with him. These essential rules have been the basis of most of the rules and regulations of miners, and have been recognized in every mining district on the Pacific Coast, and in all attempts by legislation, territorial, state or national, to regulate mining locations. Indeed it may be said that the purpose of all these laws and regulations is to secure these ends."

Wright v. Killian, 132 Cal. 56, 64 Pac. 98 (1901). See this case on page 339.

Colorado.

Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207 (1901). A district rule which provides for the location of mill sites without regard to the character of the land on which they are located is void, being inconsistent with Rev. St. 2337, confining mill sites to nonmineral land.

Idaho.

Riborado v. Quang Lang Min. Co., 2 Idaho, 131, 6 Pac. 125 (1885). A regulation, once established, is presumed still to exist and be in force until the contrary is proved.

Montana.

Penn v. Oldhauber, 24 Mont. 287, 61 Pac. 649 (1900). A custom in a mining district that 20 days' work performed upon a claim satisfied the requirements of Rev. St. 2324, as to annual work, conflicts with that section and is therefore invalid and void.

LAND OFFICE DECISIONS.

A protestant who has failed to file an adverse claim will not be heard to allege failure to comply with location regulations. These are material only where there is an effort to establish a superior right. *Hughes v. Ochsner*, 27 L. D. 396 (1898).

CHAPTER XI.

HOW TITLE TO MINING CLAIMS MAY BE TERMINATED.

I. By Abandonment.

II. By Forfeiture.

I. BY ABANDONMENT.

p. 295.

United States.

Harkrader v. Carroll, 76 Fed. 474 (1896). D. C. D. Alaska. "Abandonment is a matter of intention and whenever the intention and an actual surrender of the claim are united, the abandonment is complete and operates instantaneously to restore the title to the United States. Where a miner gives up his claim, and goes away from it without any intention of holding or repossessing it, and regardless of what may become of it, or who may appropriate it, an abandonment takes place, and the property reverts to its original status as a part of the unoccupied public domain. It is then open to location by the first comer, and after others have acquired rights therein, no sale by the former locator, made subsequently to his abandonment, will convey any right or title to his grantee, or in any way affect intervening rights." "While lapse of time is not an essential element of abandonment, it may be a strong circumstance, in connection with others, to prove the intention to abandon."

A locator, becoming sick, left his claim and the territory and "gave up all hopes of returning." He never returned to the claim and never caused the assessment work to be done. He was held to have abandoned it.

Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801 (1898). 9th Circ. Evidence that original locators, with the intention of changing their boundaries and giving a new name to their lode, relocated their claim, including therein more ground, does not show an abandonment. "The locators had the right to do this, as long as they did not interfere with the rights of other parties. The fact that the Edith was mentioned in the conveyance does not prove that the parties relied upon the title under that name. A conveyance of the ground by metes and bounds, by any name of the claim, would be valid and effective. The name is generally used to designate or identify the claim, but it may be designated or identified by the use of one or more than one, name, if it is known or called by different names. There

is no statute, law, rule, or regulation which prevents locators of mining claims from relocating their own claim, and including additional vacant ground, unclaimed by other parties, under a different name, and conveying it by the designation of the last name."

Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co., 139 Fed. 838 (1905). C. C. D. Or. The abandonment of a mining claim by one of two joint owners does not vest any right or title to his interest in his co-owner. Abandonment can only be taken advantage of by relocation. (Contra, *Worthen v. Sidway*, 72 Ark. 215, 79 S. W. 777, below.)

Farrell v. Lockhart, 210 U. S. 142, 52 Law. Ed. 994 (1908). Failure to perform any annual work may raise an inference of abandonment, even before the expiration of the period for the performance of that work. See this case on page 369, below.

Crary v. Dye, 208 U. S. 515, 52 Law. Ed. 595 (1908), affirming *Dye v. Crary*, 13 N. M. 439, 85 Pac. 1038 (1906). The owner of a mining claim which was sold under a void attachment, which he assumed or believed to be valid, declared to several persons that his interest in the property had gone to pay a debt and that he considered it well sold. It is held that his acts and declarations did not constitute an abandonment of the claim, so that he could not reassert his title as against the purchaser at the sale or his vendee.

Alaska.

Noland v. Coon, 1 Alaska, 36 (1890). The evidence of an abandonment must be clear, and the burden of proving it is on the party alleging it; but when proved it defeats the prior possession and the rights abandoned become thereby publici juris; the rights of subsequent possession are new and independent. There must be an intent to abandon, and that intent may be manifested by the declarations and acts of the parties charged with it.

Loeser v. Gardiner, 1 Alaska, 641 (1902). Abandonment is largely a matter of intent. An abandonment, like a forfeiture, can only be sustained by clear and convincing evidence. Where one does no act indicating abandonment, but on the contrary causes his assessment work to be done and sells a half interest in the claim to another person, there is no abandonment.

Arizona.

Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723 (1899). Abandonment rests in intention as well as in acts accompanying the intention. Where one locates a claim on behalf of himself and three other persons, but subsequently decides that it is worthless and tears down the location notice, and goes away and leaves the territory with the intention of having nothing further to do with the claim, it is an abandonment. The land covered by the claim is thereupon immediately open to location by others, who are not required to wait until the claim becomes forfeited by reason of a non-

compliance with the statute giving a locator 90 days in which to sink his discovery shaft, record his notice and build his monuments.

Arkansas.

Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572 (1902). "An abandonment is a voluntary act, and consists of the relinquishment of possession of the claim, with an intent not to return and occupy it. It is purely a question of intention. * * * To constitute an abandonment, there must be an absolute desertion of the premises. The burden of proving it is upon him who asserts it."

Where a locator quits work temporarily, except annual assessment work, on account of the lack of transportation for the ore taken from the mines, and another person enters the land as a homestead, but without the locator's consent, this evidence is insufficient to prove that the latter did, or intended to, relinquish his claim.

Worthen v. Sidway, 72 Ark. 215, 79 S. W. 777 (1904). Where several persons locate a mining claim, and one of them subsequently abandons his interest therein, it does not revert to the government. "The law does not recognize the acquisition from the government of fractional parts of mining claims. Each claim must be located and acquired as a whole. The assessment work required to be done is entire. One of the owners cannot do his part and thereby save his part. The result is, if one cotenant abandons his interest, it passes out, and the other cotenants acquire the entire claim by compliance with the statutes." (Contra, *Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co.*, 139 Fed. 838 above; and see *Faubel v. McFarland*, 144 Cal. 717, 78 Pac. 261, page 340, above.)

California.

McCann v. McMillan, 129 Cal. 350, 62 Pac. 31 (1900). Assessment work had not been done on a claim in California by its owners during the year 1896. On December 30, 1896, the owners went to the claim and said to each other that they would abandon it. Within ten minutes they relocated the claim in the name of a friend in New York. There was no evidence that this friend ever was told or ever knew of this relocation, and there was evidence that after December 30, 1896, the former owners had worked on the claim. Held that there was no abandonment on December 30, 1896, that the claim was forfeited after midnight of December 31, and that a person locating thereon on January 1, 1897, obtained a good title to the claim.

Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001 (1907). Where a claim is abandoned it reverts to its original status as part of the unoccupied public domain, and it carries with it all the appurtenances in the way of improvements, and a subsequent locator takes it with all existing shafts, tunnels and drifts, however extensive or costly.

Colorado.

Conn v. Oberto, 32 Colo. 313, 76 Pac. 309 (1904). An abandonment of a mining claim need not be evidenced by writing under the statute of frauds.

"Abandonment is a matter of intention, and operates instantaneously. When a miner gives up his claim and goes away from it without any intention of repossessing it, and regardless of what may become of it or who may appropriate it, an abandonment takes place, and the property reverts to its original status as a part of the unoccupied public domain. It is then publici juris, and open to location by the first comer."

Where the owners of three-fourths of a claim grant permission to a third person to enter into possession of the claim and make a location thereon, this amounts to an abandonment on their part of the claim, but such action does not deprive the owner of the remaining portion of his interest in the claim. But when the latter thereupon states that he does not care to have anything more to do with the claim, this statement, under the circumstances, must be regarded as an abandonment by him of his interest in the claim, and as a ratification of the act of his coowners. The possession of a portion of a claim under a conveyance from the locator thereof cannot ripen into a perfect title unless the original locator secures title from the government. If, therefore, the original locator abandons the claim, it becomes public land and open to entry, and the right of the grantees of the locator to occupy a portion of the land terminates. "The terms 'unoccupied' and 'unappropriated' refer to land that is not in the possession of one who claims the right of possession by virtue of a compliance with the law, and land in the possession of one who has made a valid discovery and location is not subject to location by another until after abandonment or forfeiture. But appellants did not claim to be in possession of the land by virtue of their compliance with the mining law, but by virtue of a conveyance from one who had perhaps made a valid discovery and location, but had sold the location and those to whom he had sold had abandoned the claim."

Peoria & Colorado Mill. & Min. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915 (1905). Abandonment is a question of intent. Where, after a ruling of the land office holding for cancellation a portion of a locator's entry, the locator abandons his application for patent and elects to rely solely upon his possessory title, and complies with all the requirements of the law as to assessment work for several years on the portion of the claim previously canceled by the land office, there is no abandonment of such portion, even though the locator allowed a mill site to be patented, without adverse proceedings, on another portion of the claim.

Moffat v. Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139 (1905). "Abandonment is a matter of intention, and takes place whenever the claimant of a mining claim goes away with no intention of returning to it, and with the intention of leaving it open for the next applicant." Merely to show that a prior locator did not perform his annual assessment work does not prove an abandonment by him of his claim.

Oberto v. Smith, 37 Colo. 21, 86 Pac. 86 (1906). The facts in this case are the same as in *Conn v. Oberto*, above, except that it here appears in addition that the owner of the remaining one-quarter of the claim executed a written instrument ratifying the abandonment. The decision in the former case is followed.

Montana.

McKay v. McDougall, 25 Mont. 258, 64 Pac. 669 (1901). Where there is evidence both of abandonment and of forfeiture of a claim, a charge which limited the jury to a consideration of the question of abandonment is erroneous.

"Abandonment, as applied to mining claims held by location merely, takes place only when the locator voluntarily leaves his claim to be appropriated by the next comer, without any intention to retake or claim it again, and regardless of what may become of it in the future. A forfeiture takes place by operation of law, without regard to the intention of the appropriator, whenever he neglects to preserve his right by complying with the conditions imposed by law; that is, to make the required annual expenditure upon the claim within the time allowed."

Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1 (1901). The lien of a judgment can be divested by an abandonment of the claim subsequently to the docketing of the judgment, but the surrender of the possession of the claim to one to whom the judgment debtor has sold it is not an abandonment.

Nevada.

Ford v. Campbell, 29 Nev. 578, 92 Pac. 206 (1907). The plaintiffs located a claim and did certain work, which upon survey was discovered to have been done upon conflicting territory. They posted a notice that they abandoned the work, and without removing their first location notice posted a second stating that the claim was relocated in order to better describe the locus of the claim, and no intervening rights were prejudiced. These facts did not establish an abandonment of rights under the first location.

New Mexico.

Lockhart v. Wills, 9 N. M. 263, 50 Pac. 318 (1897). Abandonment is a question of fact as well as of intent and is for the jury. A party's own testimony that he had not intended to abandon is not conclusive upon the jury. The intention to abandon must be determined by the jury from all the facts and circumstances in the case.

In ejectment, where defendant claims title by location after alleged abandonment by plaintiff, the latter may show that while in possession of the claim others entered upon the claim and ousted him and held possession adversely to him..

This case is reversed in *Lockhart v. Wills*, 9 N. M. 344, 54 Pac. 336, where the question of abandonment was held not to be involved and consequently was not considered.

Oregon.

Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219 (1906). When one who is experienced in mining and mining law sits by and sees a subsequent conflicting locator, whom he knows to be inexperienced, work his claim and expend large sums of money without objection, he cannot, after the discovery of minerals, set up that the claim in question is his. He is estopped from asserting his rights on the ground of abandonment. No overt act is necessary to constitute an abandonment; it results from an exercise of the will, and the effect thereof is to make the ground unclaimed government land, open to relocation by any one.

Although one cotenant has no right to abandon more than his interest, where he represents all the cotenants his acts bind all.

South Dakota.

McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590 (1898). "Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute, and involves only the question whether the terms of the law have been complied with. Lapse of time, absence from the ground or failure to work a claim for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Original locators may resume work at any time before relocation. Forfeiture is not complete until some one else has appropriated the property." See this case also on page 376.

Hulst v. Docrstler, 11 S. D. 14, 75 N. W. 270 (1898). A., B. and C. were co-owners of a mining claim. B. and C. pretended to establish another location, which, however, was invalid, in view of the fact that it covered much of the same ground occupied by the former claim, which had been located previously. A. applied for patent; B. and C. filed an adverse claim and in an action thereon they sought to rely both on their later location and on their original fractional right in the prior location. It was held that their effort to establish such an adverse location as against their co-owner does not estop them from relying on their original location where he has not acted upon their subsequent attempted relocation, nor does it constitute an abandonment of their interest in such original location by them; and where in their complaint they alleged both grounds of recovery and had not been compelled to proceed on the one or the other, the judgment should establish their right to their original fractional share.

Washington.

Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079 (1906). Where a locator goes away and leaves his claim without any intention of returning, having

no regard to what becomes of the claim or who may appropriate it, he has abandoned it and it is open to relocation. But to leave a claim with the intent to return later is not an abandonment.

II. BY FORFEITURE.

p. 300. See, also, chap. IX, above, and cases there collected.

United States.

McCulloch v. Murphy, 125 Fed. 147 (1903). C. C. D. Nev. A forfeiture cannot be established except upon clear and convincing proof of the failure of the original locator to have work performed or improvements made to the amount required by law. The burden of proof to establish a forfeiture rests upon him who asserts it.

Whalen Consol. Copper Min. Co. v. Whalen, 127 Fed. 611 (1904). C. C. D. Nev. Where one claims that another has forfeited his claim by failure to do the annual assessment work thereon, the burden of proof to establish such forfeiture is on the person so claiming it.

Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co., 66 C. C. A. 299, 131 Fed. 579 (1904). 9th Circ. Failure to comply with the provisions of a state statute requiring the recording of location notices within a prescribed time, but prescribing no penalty for such failure, does not work a forfeiture in favor of a subsequent locator having actual notice of the prior location. See this case also on page 321.

Zerres v. Vanina, 134 Fed. 610 (1905). C. C. D. Nev. In the absence of any provision in the statute or regulation prescribing a forfeiture for failure to record a claim within a specified time, a locator who is in actual possession and working his claim will be protected, although he failed to record within the time required by the statute of the state or the rules of the mining district. See this case also on page 322.

Yosemite Gold Min. & Mill. Co. v. Emerson, 208 U. S. 25, 52 Law. Ed. 374 (1908), affirming 149 Cal. 50, 85 Pac. 122. Whether the failure to comply with a local regulation as to location works a forfeiture in the absence of a provision making noncompliance a cause of forfeiture is not decided, since in any event there was no forfeiture here.

"In this case the locator had gone beyond this preliminary notice; the outlines of the claim had been marked, and the extent of the claim was fully known to McWhirter when he attempted his location. He knew all about the location and boundaries of the claim that any notice could have given him. He undertook to locate his new claim precisely within the boundaries of the old one, and was seeking to take advantage of the want of compliance with the statutory requirement as to the amount of annual assessment work to be done. Having this knowledge, we hold that McWhirter, and those claiming under him, could not claim a forfeiture of title for want of preliminary notice under the former location."

Arizona.

Providence Gold Min. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641 (1899). Where a person makes a location upon the same ground upon which another had made a prior location, and claims that the prior locator had forfeited his claim because of failure to do thereon sufficient work as required by law, the burden of proof is upon the second locator to prove such failure on the part of the original locator.

Arkansas.

Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572 (1902). A forfeiture of a mining claim by the failure to perform the annual labor required by law cannot be established, except by clear and convincing evidence. The burden of proving it rests upon him who sets it up.

California.

Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708 (1897). The burden of proving forfeiture for failure to do annual work is on him who alleges it.

Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036 (1901). Failure to comply with a rule of a mining camp does not work a forfeiture unless the rule expressly provides that it shall. See this case also on page 339.

Callahan v. James, 141 Cal. 291, 74 Pac. 853 (1903), reversing 71 Pac. 104. When it is claimed that a valid location has been forfeited for failure to perform the annual assessment work, the burden of proving the failure is on the party alleging it.

Southern Cross Gold Min. Co. v. Sexton, 147 Cal. 758, 82 Pac. 423 (1905). Where an application for patent has been made and receiver's receipt issued, the claim cannot be forfeited for nonperformance of annual work pending the issuance of patent.

Madison v. Octare Oil Co., 154 Cal. 766, 99 Pac. 176 (1908). A failure to do the assessment work does not create a forfeiture in favor of one occupying the claim by adverse possession. "The statute, which requires that 'one hundred dollars worth of labor shall be performed or improvements made,' declares that 'upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after such failure and before such location.' It is not provided that a mere failure to comply with the statutory requirement shall terminate the locator's right; the sole effect of such failure is to throw the land open to location by others, and, in the absence of such other location, the original claimant's right to resume work and to hold his claim remains." The right of the original claimant is terminated only by the entry of a new one entering peaceably for the purpose of relocation.

Colorado.

Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co., 30 Colo. 431, 71 Pac. 389 (1902). See this case on page 341.

Field v. Tanner, 32 Colo. 278, 75 Pac. 916 (1904). Failure to do the annual assessment work does not ipso facto work a forfeiture of a lode mining claim. It thereby merely becomes liable to forfeiture which is complete and final when the rights of third persons accrue. If, however, before such rights do attach, the original locator resumes work, the forfeiture is avoided.

Montana.

Strasburger v. Beecher, 20 Mont. 143, 49 Pac. 740 (1897). The burden of proof is on the party alleging forfeiture by failure to do annual work. Clear and convincing proof is required to establish such forfeiture. The positive testimony of a witness that he did the work is not overcome by statements of witnesses who were on adjoining claims at divers times that they did not see him and did not believe that he was there, and that they did not see any work done, especially when the former witness is corroborated.

McKay v. McDougall, 25 Mont. 258, 64 Pac. 669 (1901). See this case on pages 359 and 375.

Copper Mt. Min. & Smelting Co. v. Butte & Corbin Con. Copper & Silver Min. Co., 39 Mont. 487, 104 Pac. 540 (1909). While the burden of proof is on the party alleging the forfeiture, yet, if it be shown that the annual work was not done upon all of the claims, but only upon one for the alleged benefit of all, the burden shifts to the other party to show that the work was adapted to the development of all the claims and was intended for that purpose.

Nevada.

Sisson v. Sommers, 24 Nev. 379, 55 Pac. 829 (1899). "To enable a party to maintain a right to a mining claim after the right is acquired, it is necessary that the party continue substantially to comply, not only with the laws of congress, but with the valid laws of the state and valid rules established by the miners, in force in the district where the claim is situated upon which such right depends. Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for noncompliance or not, and the mining claim becomes subject to location by any qualified locator."

New Mexico.

Upton v. Santa Rita Min. Co., 14 N. M. 96, 89 Pac. 275 (1907). One who has acquired right of possession to a mining claim under the statute of limitations, in accordance with Rev. St. 2332, is not relieved from the

obligation of thereafter performing annual work. The claim may be subsequently forfeited and rendered subject to relocation by failure to perform such work.

Forfeiture for failure to perform annual work can be established only by clear and convincing proof of such default by the party setting up the forfeiture. Where, however, the owner has failed to file proof of labor, as required by Comp. Laws of New Mexico, § 2315, he may not invoke this rule, since that section places the burden upon him to prove that the work has been done.

South Dakota.

Dibble v. Castle Chief Gold Min. Co., 9 S. D. 618, 70 N. W. 1055 (1897). Where a relocation of a claim is sought to be established, the burden of proving that a prior location was forfeited in consequence of failure to perform annual work upon it is upon the person alleging such forfeiture, and this must be shown by clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law.

This rule is applied in a case where four disinterested witnesses, three of whom had been mine superintendents and all engaged in mining from twenty to forty years, testified that the work done was worth at least \$100, and it is held that this evidence is not met by the counter-testimony of an equal number of witnesses who testified that they regarded the work as worth less than \$100.

McCarty v. Speed, 11 S. D. 362, 77 N. W. 590 (1898). See this case on pages 360 and 376.

CHAPTER XII.

RELOCATION.

p. 306. In volume one of this work we said: "As only the unappropriated and unoccupied mineral land of the public domain is open to location, so there can be no relocation of mineral land until it has reverted to that condition. A location upon land already validly located creates no rights, and is not made valid by a subsequent abandonment or forfeiture of the original location." This conclusion was drawn into question by the decision in *Lavagnino v. Uhlig* (page 367, below). By the construction there put upon Rev. St. 2326, where a junior locator makes application for patent which the senior locator fails to adverse, or, having filed an adverse claim, waives the same, third parties who have filed adverse claims cannot set up that the ground in conflict was not at the time of the junior location unoccupied public land. Where, therefore, the question arose in proceedings under Rev. St. 2326, the abandonment or forfeiture of a senior location would not render the ground unoccupied, if there was an existing junior overlapping location. The latter, by such abandonment or forfeiture, would be validated, and so far as the conflicting area is concerned would succeed to the territorial rights of the senior locator.

Although the ground of the decision in *Lavagnino v. Uhlig* had no application in cases arising on claims to the right of possession, where no question of a right to patent is involved, it was desirable that the rule established should be extended to include all cases, where a senior location has been abandoned or forfeited. The state and territorial courts, however, declined to extend the rule laid down in *Lavagnino v. Uhlig* beyond the facts of that case and continued to follow *Belk v. Meagher*. (See vol. 1, p. 308.) In the meantime the former case has been practically overruled in *Farrell v. Lockhart* (page 369, below). While upholding the correctness of the decision in the former case the court qualifies the opinion upon which the decision was based

and now holds that the third locator may offer proof of the existence of a valid and subsisting location anterior to that which is being adversed. If such a prior location is established, and the statutory period for performing annual work had not expired at the date of the second location, this can only be supported by establishing an abandonment of the first. The effect of the two cases has been to create much discussion and uncertainty; but it seems to us that our former statement of the law must stand.

In some states the relocater of a claim is required to state in his location notice that the claim is located as forfeited or abandoned property. Arizona Rev. St. 1901, par. 3241; Colorado, M. A. S. 3160; Nevada, Comp. Laws 1907, § 214; North Dakota, Pol. Code, § 1813; South Dakota, Pol. Code, § 2545; Washington, 3 Bal. Ann. Code, § 3151a; Wyoming, Rev. St. 1899, § 2552. See these statutes generally on the method of relocation, also Idaho Civ. Code, § 2560; Montana Laws 1907, p. 21, §§ 4-9; Oregon, 2 B. & C. Codes, § 3978. Since the act of relocation is in itself an admission of the validity of the original location, a recital in the notice that the claim is a relocation is equally an admission of that fact.

United States.

Royston v. Miller, 76 Fed. 50 (1896). C. C. D. Nev. One of two co-owners, acting for himself and as agent for his co-owner, did the annual work on a series of claims. He supposed and intended this to cover a claim that was not contiguous to the others. He could not, subsequently, relocate this claim to the exclusion of his cotenant. He stood in a fiduciary relation to her, it was his duty to do the work on this claim, and he could not take advantage of his own wrong. *Hunt v. Patchin*, 35 Fed. 816, vol. 1, p. 210, followed.

Justice Min. Co. v. Barclay, 82 Fed. 554 (1897). C. C. D. Nev. Where mining ground is leased for the express purpose of performing enough work to hold the adjoining claims, the lessee cannot make a valid relocation of them. See this case also on page 333.

Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801 (1898). 9th Circ. See this case also on page 355.

Brown v. Oregon King Min. Co., 110 Fed. 728 (1901). C. C. D. Or. When a location is invalid, the claim is subject to relocation. Whether or not the locator knew of the former invalid location does not affect the validity of the relocation. Such knowledge would not constitute him a trespasser or jumper.

Thallmann v. Thomas, 49 C. C. A. 317, 111 Fed. 277 (1901). 8th Circ. A valid location of public land cannot be instituted while another has the

possession and right of possession under an earlier lawful location. See this case also on pages 249 and 380.

Lockhart v. Johnson, 181 U. S. 516, 45 Law. Ed. 979 (1901). See this case on page 259.

Neilson v. Champagne Min. & Mill. Co., 55 C. C. A. 576, 119 Fed. 123 (1902). 8th Circ. After entry in the land office a claim is not subject to relocation. See this case under chap. XIV, div. III.

McCulloch v. Murphy, 125 Fed. 147 (1903). C. C. D. Nev. "Actual possession of a mining claim is not essential to the validity of a title obtained by a valid location; until such location is terminated by abandonment or forfeiture no right or claim to the property can be acquired by an adverse entry thereon with a view to the relocation thereof."

Laragnino v. Uhlig, 198 U. S. 443, 49 Law. Ed. 1119 (1905), affirming 26 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808. The Uhlig claims were located in 1880, and included within their areas a portion of a subsisting valid claim known as Levi P. The latter claim, having become forfeited for failure to do assessment work, was relocated by the plaintiff as the Yes You Do claim in 1898. Subsequently the owners made application for patent, and an adverse claim was filed thereto by the plaintiff. It was held that he could not assail the defendants' title in respect to the conflict which had previously existed between their location and the forfeited claim.

"It is undoubted that this court in a number of cases has declared that the rights of a subsisting senior locator of mineral land are paramount to those of the owner of a junior location, so far as said junior location conflicts in whole or in part with the prior location. *Clipper Min. Co. v. Eli Min. & Land Co.*, 194 U. S. 220, 226, 48 Law. Ed. 944, and cases cited. It is elementary also that the power conferred by section 2324 of the Revised Statutes, to relocate a forfeited mining claim, does not place the locator in privity of title with the owner of the prior and forfeited location."

Rev. St. 2326 "plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for which a patent is sought, he may abandon such rights and cause them in effect to enure to the benefit of the applicant for a patent by failure to adverse, or, after adverse, by failure to prosecute such adverse.

"It cannot be denied that under section 2326, if before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adverse, the application, upon an establishment of a prima facie right in the owners of the Uhlig claims, an indisputable presumption would have arisen that

no conflict claims existed to the premises described in the location notice. *Gwillim v. Donnellan*, 115 U. S. 45, 51, 29 Law. Ed. 348. And the same result would have arisen had the owner of the Levi P. adverse the application for a patent based upon the Uhlig locations, and failed to prosecute and waived such adverse claims.

"In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete.

"Of course the effect of the construction, which we have thus given to section 2326 of the Revised Statutes, is to cause the provisions of that section to qualify sections 2319 and 2324, thereby preventing mineral lands of the United States, which have been the subject of conflicting locations, from becoming quoad the claims of third parties, unoccupied mineral lands, by the mere forfeiture of one of such locations.

"In text books (*Barringer & Adams, Law of Mines and Mining in the United States*, p. 306; *Lindley on Mines*, 2d Ed., pp. 650, 651) statements are found which seemingly indicate that in the opinion of the writers, on the forfeiture of a senior mining location, quoad a junior and conflicting location, the area of conflict becomes in an unqualified sense unoccupied mineral lands of the United States without enuring in any way to the benefit of the junior location. But, in the treatises referred to, no account is taken of the effect of the express provisions of Rev. Stat. section 2326. Moreover when the cases to which the text writers referred, as sustaining the statements made, are examined, it will be seen that they were decided either before the passage of the adverse claim statutes of 1872, or concerned controversies between the senior and junior locators or depended upon the provisions of state statutes. How far such statutes would be controlling, we are not called upon to say, as it is not claimed that there is any statute in Utah in any way modifying the express provisions of section 2326."

Malone v. Jackson, 70 C. C. A. 216, 137 Fed. 878 (1905). 9th Circ. B. located a claim on Dec. 6, 1898. The same ground was located by the plaintiff in July, 1899, and by the defendant in January, 1902. B. did no work on the claim, and his rights were consequently forfeited on January 1, 1900, when the ground was open to relocation; but prior to that date it was not open to relocation, and consequently, under *Belk v. Meagher* (see vol. 1, p. 308), plaintiff's location was invalid, and he could not recover in ejectment against defendant whose location was good.

Stewart v. Westlake, 78 C. C. A. 341, 148 Fed. 349 (1906). 8th Circ. "A lessee of a mining claim who has contracted to do an amount of work thereon which would be a sufficient compliance with the legal requirements in respect of development, and also to notify the lessor of any intention to surrender or abandon the lease, cannot upon failing to perform his obligations secretly relocate the claim and so secure and hold for himself the title." He will hold such title in trust for the lessor.

Zerres v. Vanina, 80 C. C. A. 366, 150 Fed. 564 (1907), 9th Circ., affirming 134 Fed. 610 (1905). C. C. D. Nev. "One may make an original location of a mining claim upon land marked and occupied under an attempted prior location if such prior location is void by reason of failure to comply with the law as to location notice or recording the same, but he cannot make a relocation of such a claim. Such land, if mineral, is, notwithstanding the prior proceedings, unappropriated public land subject to location. Relocation is authorized only for forfeiture or abandonment of a prior location. By making a relocation the locator makes admission of the validity of the prior location and precludes himself from contesting it."

Farrell v. Lockhart, 210 U. S. 142, 52 Law. Ed. 994 (1908), reversing *Lockhart v. Farrell*, 31 Utah, 155, 86 Pac. 1077 (1906). The South Mountain Lode claim was located in August, 1900. No work was done thereon. Farrell located the same ground as the Cliff claim on August 1, 1901, and Rhodin located it as the Divide claim on January 2, 1903. Farrell applied for patent. To this Rhodin filed an adverse claim upon which his administrator brought this suit. The trial court treated the proof in regard to the location of the South Mountain claim as immaterial and irrelevant, and entered a decree in favor of Farrell. On appeal this was reversed by the supreme court of Utah, which, while not doubting that *Lavagnino v. Uhlig* had been correctly decided in view of the issues in that case, yet held that the ruling in that case must be considered as narrowed, so as to apply only to a case where the second location did not embrace the discovery point of the first, but was a mere overlap. "Thus applying the ruling in *Lavagnino v. Uhlig*, the court held that as the location by Farrell of the Cliff claim was made upon substantially the same ground embraced by the South Mountain, and the statutory period for the forfeiture of the South Mountain claim had not expired, the Cliff claim was not located on ground subject to location, and was void; that as the Divide had been located or relocated after the lapsing of the South Mountain claim, the Divide claim was located on land subject to be appropriated, and was therefore paramount to the second or Farrell location. The judgment of the trial court was therefore reversed and a decree was made in favor of the administrator of Rhodin. 31 Utah, 155, 86 Pac. 1077. Farrell thereupon sued out this writ of error.

"In the argument at bar our attention has been directed to several decisions of the highest courts in some of the mining states or in territories of the United States where mining prevails—*Nash v. McNamara*, 30 Nev. 114, 93 Pac. 405, 16 L. R. A. (N. S.) 168, and cases cited—which, in considering the reasoning of *Lavagnino v. Uhlig*, also attributed to that reason-

ing, broadly construed, the serious and unfavorable consequences on rights of property suggested by the court below in its opinion. It may not be doubted, unless the reasoning in the Lavagnino case is to be restricted or qualified, that the grounds upon which the court below rested its conclusions were erroneous. Not doubting at all the correctness of the decision in the Lavagnino case, especially in view of the issue as to long possession and the operation of the bar of the statute of the State of Utah, which was applied by the court below in that case, and whose judgment was affirmed, we do not pause to particularly reexamine the reasoning expressed in the opinion in *Lavagnino v. Uhlig* as an original proposition. We say this, because whatever may be the inherent cogency of that reasoning, in view of the experience of the courts referred to concerning the practice which it was declared had prevailed, in reliance upon what was deemed to be the result of previous decisions of this court, and the effect on vested rights which it was said would arise from a change of such practice, and taking into view the prior decisions referred to, especially *Belk v. Meagher*, 104 U. S. 279, 26 Law. Ed. 735, as also the more recent case of *Brown v. Gurney*, 201 U. S. 184, 50 Law. Ed. 717, we think the opinion in the Lavagnino case should be qualified so as to not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that at the time such prior location was made the ground embraced therein was covered by a valid and subsisting mining claim. It is to be observed that this qualification but permits a third locator to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adversed. It does not, therefore, include the conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if at the time of such second location there had been an actual abandonment of the original senior location. We say this because—taking into view *Belk v. Meagher*, *Lavagnino v. Uhlig* and *Brown v. Gurney*—we are of the opinion, and so hold, that ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor, if, at the time when the second location was made, there had been an actual abandonment of the claim by the first locator.”

“It remains only to test the correctness of the conclusions of the court below in the light of the principles just announced. Now, it was found by the trial court that the evidence offered tended to show that the South Mountain lode claim was located in August, 1900, and that no work was ever done on said claim, and that it became forfeited for want of the annual labor required by the statute on December 31, 1901. Farrell made his location in August, 1901, a year after the South Mountain was located and five months before the expiration of the period when a statutory for-

feiture of the South Mountain would have resulted. The offer of proof, therefore, made by the administrator of Rhodin, to show that the South Mountain was a valid and subsisting location when Farrell made the location of the Cliff, tended to show that during the year that had intervened between the location of the South Mountain and the location by Farrell of the Cliff no work of any character whatever was done by the locators of the South Mountain, and that this was also true from the time the cliff was located to the expiration of the period when a statutory forfeiture would have been occasioned. As all rights of the locators of the South Mountain were, in any aspect, at an end by their failure to adverse, and as the Cliff was prior in time to the Divide, and therefore the burden of proof was on the Divide to establish that the Cliff location was not a valid one, we think that the burden would not have been sustained by the proof offered. To the contrary, we are of opinion that the proof which was so offered on behalf of the Divide tended, when unexplained, to show that the location of the South Mountain was not made in good faith, and that the claim had actually been abandoned when Farrell made his location. The Supreme Court of Utah should therefore have remanded the cause, so that it might be determined whether or not the South Mountain had been abandoned by the locators of that claim when Farrell made his location; and error was therefore committed in entering judgment in favor of Lockhart, the administrator of Rhodin, decreeing to him possession of the ground in controversy."

Alaska.

Montague v. Labay, 2 Alaska, 575 (1905); *Dufresne v. Northern Light* himself and B. B. represented to C. that the location made by A. was invalid, and advised C. to make a location of the same ground for himself, which C. thereupon did. Held that C.'s location was void and of no effect; it could not be good as to B.'s share in the claim. "Whatever force an estoppel may have in another case, it cannot make a second location of the same mining claim valid." C.'s title depended upon his location, which must fail, and his title must fail with it. However reprehensible B.'s conduct was, it could not give life to a mining location in violation of the laws of congress.

Montague v. Labay, 2 Alaska, 575 (1905); *Dufresne v. Northern Light Min. Co.*, 2 Alaska, 592 (1905). Where a junior location overlaps a senior location, upon the forfeiture of the latter the area of conflict becomes unoccupied mineral land of the United States and does not inure in any way to the benefit of the junior locator. The court reviewed *Lavagnino v. Uhlig*, 198 U. S. 443, 49 Law. Ed. 1119, and held that the decision in that case was confined to its facts and did not overrule *Belk v. Meagher*, 104 U. S. 279, 23 Law. Ed. 735.

Arizona.

Jordan v. Duke, 6 Ariz. 55, 53 Pac. 197 (1898). A locator waited until December 31, 1883, before doing any assessment work on his claim for 1883. He then continued to work for five or six days, making an expenditure of about \$60, after which he went away and never returned. On January 1, 1884, B. entered, posted notices and set up monuments, for the purpose of relocating the claim. It was held that his location was invalid, since, at the time when it was attempted to be made, the prior claim had not been abandoned, and the abandonment five or six days later could have no effect in curing the original invalidity of the relocation.

"It has become a settled law that, if the work be not completed on a mining claim in any part of the year in which the statute requires it to be done, but the owners thereof are upon the ground for the purpose of doing the work before the year expires, and then prosecute the work to completion, the work so prosecuted will have relation to the year in which it should have been done, and that such resumption will prevent the claim from being forfeited. Such resumption effectually prevents it from becoming forfeited, and no forfeiture can take place until after there is a failure to prosecute the work, after the same has been resumed. It is also well settled that, until a claim has been abandoned or has been forfeited, no other location can be made of the ground. The decisions go so far as to make it a settled law that, if the first locator resumes work at any time even after the expiration of the year, but before other rights attach in favor of relocators, he preserves his claim."

Jordan v. Schuerman, 6 Ariz. 79, 53 Pac. 579 (1898). Evidence of an amended location may be introduced, except as against the rights of parties which have accrued between the time of the original location and the amended location. So where a mining claim was located and thirteen years later relocated, several other locations covering part of the land in question having been made in the meantime, evidence of the relocation is admissible in an action to quiet title thereto except as against rights which may have accrued by reason of such intervening locations.

Kinney v. Fleming, 6 Ariz. 263, 56 Pac. 723 (1899). See this case on page 356.

Providence Gold Min. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641 (1899). A recital in the location notice of a mining claim that such claim is a relocation of a prior claim impliedly admits the validity of the prior location.

Cunningham v. Pirrung, 9 Ariz. 288, 80 Pac. 329 (1905). Under par. 3241, Rev. St. Ariz. 1901, where a new locator's rights are based upon the loss of the possessory right acquired by a former locator, a location certificate which fails to state that the claim is located as forfeited or abandoned property is void, and the new locator acquires no rights under it. But it is only when the prior location is a valid location that the subsequent location notice should contain such statement; for where a subsequent locator bases his right upon the contention that the prior locator never made a valid location under the law, then he is not relocating a forfeited

or abandoned claim, but is making an original location of a claim, the prior attempted location of which is invalid, and in such case the above statute has no application. Indeed if he were to state, in such case, that he located the claim as abandoned property, he would thereby be precluded from contesting the question to be determined, namely, the validity of the prior location.

Whether the issue be the forfeiture or the abandonment of the prior location, or the validity of the prior location, in either case the burden of proof is on the subsequent locator to establish such abandonment or forfeiture, or the invalidity of the prior location.

Score v. Griffin, 9 Ariz. 295, 80 Pac. 331 (1905). A new locator must base his right either upon the abandonment or forfeiture of the prior locator, or upon the invalidity of the prior location; and if he choose the former he must set forth that fact in his location certificate.

Matko v. Daley, 10 Ariz. 175, 85 Pac. 721 (1906). In a relocation of land which is claimed under forfeiture or abandonment, the location notice is void if it fails to state that the claim was located as forfeited or abandoned property, as required by the statute.

Kinney v. Lundy, 89 Pac. 496 (1907). A location notice on a relocation which fails to state that the claim is located as forfeited or abandoned property, as required by Ariz. Rev. St. 1901, § 3241, may be cured by the filing of an amended notice, provided rights of others have not intervened. See this case also on page 318.

Arkansas.

Ware v. White, 81 Ark. 220, 108 S. W. 831 (1906). A. located a mining claim in 1898, but the notices were deficient and but little work was done. In 1900 B., seeing only the insufficient notice of A. and no affidavits of assessment work, proceeded to make a location. B.'s notice was also insufficient but he did do the assessment work. In 1904 A. filed an amended notice to correct the one of 1898. Held, a mining claimant has a right to amend his location notice and mark his claim on the ground, if there are no intervening rights. But an amendment of a claimant not in possession cannot be made to relate back to the original location so as to cut out intervening locators even though their location be defective in some particular. A mining claim in the adverse possession of another is not subject to relocation. Without deciding that B. had title, the court held that his possession and requisite annual assessment work under a defective location was sufficient to defeat a recovery on a patched relocation where there was no peaceable entry and possession of the land nor work done under it. If B. could peaceably hold possession against the world and do the requisite work for the required time, he would be entitled to a patent even without a valid location notice.

California.

Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901 (1904), affirmed 143 Cal. xviii, 76 Pac. 1127. Where the description of a mining claim

in a patent contains references to artificial and to natural monuments to which the claim is tied, and by means of which its exact locus on the ground can be positively determined, the land covered by the patent is not open to relocation by another person, even though the description in the patent gives an erroneous length to the tying line of the claim.

Weed v. Snook, 144 Cal. 439, 77 Pac. 1023 (1904). While a locator, who has made his location, is engaged, in good faith, in prospecting it for minerals, and complies with the laws as to expenditures, and is in possession, the land is not open to location by others. A locator "must make his location in good faith, and use proper diligence to make discovery of oil. If he does not do so he will lose his rights under his location, as to parties who may afterwards in good faith acquire rights. But where the locator is in possession under his location, and is actively at work through his lessees or otherwise, and expending money for the purpose of discovering oil, his rights cannot be forfeited to third parties who attempt to make locations under such circumstances."

Colorado.

Niles v. Kennan, 27 Colo. 502, 62 Pac. 300 (1906). The owner of a mining claim abandoned it on December 20, 1890, because he was unable to perform the annual work for that year. His son relocated the claim on January 30, 1891, as an abandoned lode, giving the date of discovery as December 20, 1890, and then conveyed the claim to his father, who continued to claim the ground under his son's location until after a subsequent location by B. The son's location was defective and therefore invalid, and it was held that the father could not recall his abandonment and rely upon his original location, claiming that the son's relocation was merely to protect his rights under the original claim.

Rebecca Gold Min. Co. v. Bryant, 31 Colo. 119, 71 Pac. 1110, 102 Am. St. Rep. 17 (1903). The mere cancellation by the land department of an entry for patent does not render the ground open to relocation. See this case also on page 429.

Carlin v. Freeman, 19 Colo. App. 334, 75 Pac. 26 (1904). M. A. S., § 3162, provides that, in the case of the relocation of abandoned lode claims, "the location certificate may state that the whole or any part of the new location is located as abandoned property." The word "may" is not mandatory but permissive, and a relocation certificate which does not state that the ground or any part of it was located as abandoned property is not thereby rendered void.

Field v. Tanner, 32 Colo. 278, 75 Pac. 916 (1904). Where one enters upon a mining claim and prevents a prior locator from entering in order to perform his assessment work, the former cannot take advantage of his own wrong and set up the failure of the prior locator to do the work as a ground for the forfeiture of his claim.

Peoria & Colorado Mill. & Min. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915 (1905). "The attempt to make a location upon territory that is at the

time embraced within a prior, subsisting, and valid location, is void. The prospector is guilty of a trespass, even when he goes upon such a subsisting location for the purpose of making his discovery, and every subsequent act by him in attempting to perfect a location is an additional trespass."

Moorhead v. Erie Min. & Mill. Co., 43 Colo. 408, 96 Pac. 253 (1908). A. located the X claim and on the same day, but later, located the Y claim which overlapped X. The various acts necessary to location were first performed on X, subsequently on Y. Later the X claim was abandoned by failure to do the annual assessment work. X was the senior and Y the junior claim, so that the area in conflict belonged to X. Upon its abandonment it did not become a part of Y, but reverted to the public domain subject to relocation by A. or another. A. might avoid the effect of such abandonment by himself re-entering without force upon the X claim and resuming work thereon before a third party acquired rights therein; or he might make the conflict territory a part of the Y claim by filing an additional or amended location certificate, as prescribed by statute; or he might secure ownership of this conflict territory as well as of other parts of the abandoned claim by initiating an entirely new location before intervening rights were acquired by other parties through similar steps. But failing to act promptly and avail himself of these privileges, A. would lose all right to the ground upon the perfecting of a location thereof by another party.

Montana.

McKay v. McDougall, 25 Mont. 258, 64 Pac. 669, 87 Am. St. Rep. 395 (1901). Where a claim had been validly located, but the requisite assessment work for a particular year had not been done, and another person thereupon attempted to make a location but filed an informal notice of location, the resumption of work by the first locator in good faith, before the subsequent locator amended his notice, prevented a forfeiture by the former. "It is only by a complete relocation by another after default of the first locator that a forfeiture is wrought."

Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455 (1906). Where a locator after posting his notice fails to comply with statutory requirements as to the completion of his location, and another has made a subsequent location in conflict therewith, the area in conflict does not revert to the public domain, but inures to the benefit of the junior locator, who by performing the necessary acts of location becomes entitled to possession. The interest of a locator prior to patent is only a right to exclusive possession, based upon his performance of the conditions imposed by statute, on failing to perform which he loses his right.

Nevada.

Nesbitt v. DeLamar's Nev. Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 77 Am. St. Rep. 807 (1898). A., B. and C. located a claim in 1892. E. and F., under

the belief that they had acquired the interests of A. and B. by judgment and execution, which it seems were not effective for want of jurisdiction, and acting in good faith at the instance of C., who recognized them as cotenants, filed notices under the special acts of 1893 and 1894 which suspended the provisions of Rev. St. 2324 for those years. Held this action was sufficient to defeat an attempted relocation of the ground. See this case also on page 344.

Nash v. McNamara, 30 Nev. 114, 93 Pac. 405, 16 L. R. A. (N. S.) 169 (1908). A. located the Portland claim on July 1, 1905; on July 25th N. located the same ground as the Union claim, and on September 29th M. located it as the Liberty and Justice. A. failed to sink a discovery shaft within 90 days, as required by the law of Nevada. Inasmuch, however, as he had until September 28th the exclusive right of possession, N.'s attempted location on July 25th was void at that date, and gave him no rights after the land became open to relocation. In order to acquire such rights he must perform the acts of relocation after that date. Consequently, as against M., he had no right to the possession of the land.

Golden v. Murphy, 103 Pac. 394 (1909). Where one asserts rights to a mining claim as a relocater on the theory that the claim had been forfeited for failure to perform the requisite annual work, he recognizes the existence of the prior location forfeited by the relocation.

South Dakota.

McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 50 L. R. A. 184 (1898). In determining whether certain persons who had been cotenants of a mining claim had ceased to be such, no work having been performed for some time on the claim, the court says: "Actual possession of the claim is not essential to the validity of the title obtained by a valid location, and until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the location thereof. Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute, and involves only the question whether the terms of the law have been complied with. Lapse of time, absence from the ground, or failure to work a claim for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Original locators may resume work at any time before relocation. Forfeiture is not complete until some one else has appropriated the property." It is therefore held that the relation of cotenants continued to exist so long as the mining claim had not been forfeited by a new location by strangers, there being no abandonment, and consequently an attempted relocation by one of such cotenants inured to the benefit of all, he holding as trustee for them. Where two persons located a placer claim and later in conjunction with two others located a lode claim upon the same premises, it is held in a contest between the assignee of one of these others, and the original locators, that the location of the lode claim is valid, and further that they are estopped from asserting its invalidity.

McPherson v. Julius, 17 S. D. 98, 95 N. W. 428 (1903). A location which conflicts with a prior location is, if based on a proper discovery, valid as against all persons except the prior locator; and if the prior claim is abandoned or forfeited, or any part thereof is not rightfully held by the prior locator, the subsequent location attaches to so much thereof as is within its lines. In this case the prior location covered more ground than allowed by law. The excess was subsequently abandoned, and left in the possession of the subsequent locator. In a contest between the latter and a third person, this one cannot attack the location on the ground that it covered land included in the prior location. The third party was held not to be concerned with that question.

Garvey v. Elder, 21 S. D. 77, 109 N. W. 508, 130 Am. St. Rep. 704 (1906). See this case on page 347.

Utah.

Argentine Min. Co. v. Benedict, 18 Utah, 183, 55 Pac. 559 (1898). Where one is employed as an agent to perform the assessment work on a claim, and neglects or willfully abstains from doing the work, but lulls his employer into believing that the work has been done, he cannot relocate the ground in order to establish a claim of his own, contending that the employer's rights are forfeited by failure to do the assessment work. To allow such relocation under such circumstances would be to sanction fraud by the agent upon his principal. And where the attempted relocation is made for a company of which such agent was the manager and superintendent, the company will be held to have had constructive knowledge of the fraud, and the relocation will be none the less invalid.

Silver City Gold & Silver Min. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11 (1899). Lessees of mining ground, who oust their lessor by relocating the ground and setting up an adverse title in themselves, forfeit all rights under the lease.

Washington.

Paragon Min. & Development Co. v. Stevens County Exploration Co., 43 Wash. 59, 87 Pac. 1068 (1906). The Act of 1899, p. 71, § 8, requires the certificate of location to state whether the whole or any part of the claim is located as abandoned property; § 2 requires the sinking of a discovery shaft before filing the certificate. A. made a location, posted notice thereof, and set stakes at two corners, then leaving the ground and doing nothing. Three months later B. entered, did the various acts required and made application for patent. In an action on an adverse claim it was claimed that B. violated § 8 in not referring to the claim as abandoned, but held A. never acquired rights sufficient to make the claim abandoned property.

National Mill. & Min. Co. v. Piccolo, 54 Wash. 617, 104 Pac. 128 (1909). A relocation is not complete until the provisions of the Laws of 1899, c. 45, § 8, in regard to the sinking of a discovery shaft, are complied with. The marking of the ground and posting of notices are not sufficient.

The proviso in § 9 that the provisions as to discovery shafts shall not apply west of the summit of Cascade Mountains does not apply to relocations which adopt existing discoveries.

Wyoming.

Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36 (1906). Land upon which a valid location has been made, which has been neither abandoned nor forfeited, is segregated from the public domain, and, until some act or laches of the owner occurs by which title reverts to the government, cannot be relocated.

A. located mining land, which he subsequently abandoned and which B. relocated. B. then sold to A. who applied for a patent. B.'s location certificate described the claim as a relocation of a former abandoned claim and made use of the stakes and survey of the former location. By accepting conveyance from B., A. therefore adopted the later claim as the basis of his title and in an action on an adverse claim his right of possession commenced at the date of the relocation.

LAND OFFICE DECISIONS.

"The amended location authorized by the Colorado law is essentially different from the relocation authorized by sec. 2324 of the Revised Statutes. The former is made in furtherance of the original location and for the purpose of giving additional strength or territorial effect thereto, while the latter is a new and independent location which can only be made where the original location and all rights thereunder have been lost by failure to make the necessary annual expenditure." "Teller's rights under the amended locations depend upon his ownership of the original locations and if at that time they were owned or partly owned by others, their title was not divested or lost by his amended location." *John C. Teller*, 28 L. D. 484 (1898).

Title acquired by location cannot be divested by an amended location from which the name of one of the original locators is omitted, unless done with his knowledge and consent. *Samuel H. Auerbach*, 29 L. D. 208 (1899).

CHAPTER XIII.

THE POSSESSORY TITLE OR TITLE BEFORE PATENT.

I. The Right of Possession.	III. Conveyance of Mining Claims
II. Action for the Possession of Mining Claims.	Before Patent. Statute of Frauds.

I. THE RIGHT OF POSSESSION.

p. 317. A stranger may not enter upon a validly located claim, against the will and without the consent of its owner, for the purpose of initiating a new location. Such an entry is a trespass. This rule is applicable to both lode and placer claims. It makes no difference that the entry is made upon a placer claim for the purpose of locating lodes therein. Any entry thereon without the owner's consent is a trespass, and a location based upon such an entry is, as against him, of no effect.

Where there has been a valid location, actual possession is not requisite to preserve the title. On the other hand, where there is not a valid location, or the location has not been completed, the right of possession is based only upon actual possession held for the purpose of exploration or of completing the acts of location. If the occupant fails to maintain actual possession, others may enter upon the ground for the purpose of locating it. And even when he maintains such possession, others may enter for that purpose, provided they do so openly, peaceably and in good faith, without force or fraud. The maintenance of actual possession includes active protection against the known intruder.

United States.

St. Louis Min. & Mill. Co. v. Montana Min. Co., 171 U. S. 650, 43 Law. Ed. 320 (1898). "Where there is a valid location of a mining claim the area becomes segregated from the public domain and the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he

may sell it, mortgage it or part with the whole or any portion of it as he may see fit."

Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673 (1899). C. C. S. D. Cal. "Upon mineral land of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and above board, and made in good faith." "One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin or temporarily absent from his claim."

Thallmann v. Thomas, 49 C. C. A. 317, 111 Fed. 277 (1901), 8th Circ., affirming 102 Fed. 935. A valid location of public land cannot be instituted while another has the possession and right of possession under an earlier lawful location. A valid claim to public land cannot be initiated by forcible entry upon it, even while it is in the possession of one who has no right to the possession, and no lawful claim to secure the title. But a competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry and location thereof while it is in the possession of those who have no superior right to acquire the title or to retain the possession.

Teller v. U. S., 51 C. C. A. 230, 113 Fed. 273 (1901). 8th Circ. See this case under chap. XIV, div. III, and chap. XIX, div. III.

McCulloch v. Murphy, 125 Fed. 147 (1903). C. C. D. Nev. "Actual possession of a mining claim is not essential to the validity of the title obtained by valid location. Until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the relocation thereof."

Zerres v. Vanina, 134 Fed. 610 (1905). C. C. D. Nev. Follows *McCulloch v. Murphy*, above. "The law is settled beyond controversy that a party cannot locate a valid claim to a lode already located and legally possessed by others." See this case also on page 369.

United States Min. Co. v. Larson, 67 C. C. A. 587, 134 Fed. 769 (1904). 8th Circ. The seniority of mining claims is determined by the order in which they are located, whether they have been patented or remain unpatented.

The inclusion in a patent of the area in conflict between two claims is necessarily a determination that at the time of the patent proceedings such area was a part of that claim. But while the area in conflict is usually awarded to the senior claim, it is not always or necessarily so, because acts or circumstances entirely consistent with the true order of location may have intervened, which require that this area be awarded to a junior

claim. Therefore, a determination in the course of patent proceedings that one claim is superior to another within the area of conflict does not estop the owner of the latter from asserting, in subsequent judicial proceedings, that it was prior in location, unless the question of priority of location was in fact presented and decided in the patent proceedings. (Affirmed in *Lawson v. U. S. Min. Co.*, 207 U. S. 1, 52 Law. Ed. 65. See chap. XIV, div. III, below.)

Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S. 220, 48 Law. Ed. 944 (1904), affirming 29 Colo. 337, 68 Pac. 286. The entry by a stranger upon a validly located placer claim is a trespass and cannot be relied upon to sustain the location of a lode claim therein.

Brewer, J.: "It will be seen that section 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or at least his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mines and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located."

"By section 2329 placer claims are subject to entry and patent 'under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.' The purpose of this section is apparently to place the location of placer claims on an equality both in procedure and rights with lode claims. If there were no other legislation in respect to placer claims, the case before us would present little doubt, but following this are certain provisions, those having special bearing on the case before us being found in section 2333."

"A mineral lode or vein may have its apex within the area of a tract whose surface is valuable for placer mining, and this last section is the provision which Congress has made for such a case. That a lode or vein, descending as it often does to great depths, may contain more mineral than can be obtained from the loose deposits which are secured by placer mining within the same limits of surface area, naturally gives to the surface area a higher value in the one case than the other and that Congress appreciated this difference is shown by the different prices charged for the surface under the two conditions. Often the existence of a lode or vein is not disclosed by the placer deposits. Hence ground may be known to be valuable and be located for placer mining, and yet no one be aware that underneath the surface there is a lode or vein of greater value. A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral upon or near the surface. A lode or vein may be known to exist at the time of the placer location or not known until long after a patent therefor has been issued. There being no necessary connection between

the placer and the vein Congress by the section has provided that in an application for a placer patent the applicant shall include any vein or lode of which he has possession, and that if he does not make such inclusion the omission is to be taken as a conclusive declaration that he has no right of possession of such vein or lode."

"It is contended that because a vein or lode may have its apex within the limits of a placer claim a stranger has the right to go upon the claim, and by sinking shafts or otherwise explore for any such lode or vein, and on finding one obtain a title thereto. That, with the consent of the owner of the placer claim, he may enter and make such exploration, and if successful obtain title to the vein or lode, cannot be questioned. But can he do so against the will of the placer locator? If one may do it, others may, and so the whole surface of the placer be occupied by strangers seeking to discover veins beneath the surface. Of what value then would the placer be to the locator? Placer workings are surface workings, and if the placer locator cannot maintain possession of the surface he cannot continue his workings. And if the surface is open to the entry of whoever seeks to explore for veins, his possession can be entirely destroyed. In this connection it may be well to notice the last sentence in section 2322."

"It would seem strange that one owning a vein and having a right in pursuing it to enter beneath the surface of another's location should be expressly forbidden to enter upon that surface if at the same time one owning no vein and having no rights beneath the surface is at liberty to enter upon that surface and prospect for veins as yet undiscovered.

"We agree with the Supreme Court of Colorado as to the law when it says that 'one may not go upon a prior valid placer location to prospect for unknown lodes and get title to lode claims thereafter discovered and located in this manner and within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it.' Perhaps if the placer owner, with knowledge of what the prospectors are doing, takes no steps to restrain their work and certainly if he acquiesces in their action, he cannot after they have discovered a vein or lode assert right to it, for, generally a vein belongs to him who has discovered it, and a locator permitting others to search within the limits of his placer ought not thereafter to appropriate that which they have discovered by such search."

"No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent or clandestine entry thereon.

"If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts or otherwise, is undoubtedly a trespass, and such a trespass cannot be relied upon to sustain a claim of a right to veins and lodes. It will not do to say that the right thus claimed is only a right to something which belongs to the United States and which will never belong to the placer locator, unless specifically applied and paid for by him, and therefore that he has no cause of complaint; for if the claim of the lode locator be sustained it carries under sections 2320 and 2333 at

least twenty-five feet of the surface on each side of the middle of the vein. Further, if there be no prospecting, no vein or lode discovered until after patent, then the title to all veins and lodes within the area of the placer passes to the placer patentee and any subsequent discovery would enure to his benefit."

Malone v. Jackson, 70 C. C. A. 216, 137 Fed. 878 (1905). 9th Circ. For the facts of this case see page 368, above. The plaintiff could not recover in ejectment on the ground of his prior actual possession. It was not based on any right of possession because not based on a valid location. Being ousted, he was without right of possession, and under *Belk v. Meagher* (see vol. 1, p. 321) had no right of action.

Elder v. Wood, 208 U. S. 226, 52 Law. Ed. 464 (1908), affirming *Wood v. McCombe*, 37 Colo. 174, 86 Pac. 319, 119 Am. St. Rep. 269. A tax title to an unpatented mining claim was attacked on the ground that the property was not subject to state taxation, as the title was in the United States, and the levy of the tax was therefore a nullity. The title was sustained on the ground that there was no taxation of the land, but only of the right of possession. The enabling act of March 3, 1875, provided that no taxes should ever be imposed upon lands or property of the United States.

"A statute of Colorado authorized the taxation of mining claims, whether patented or entered for patent or not, in these words: 'In case the mine or mining claim shall not be patented, or entered for patent, but shall be assessable and taxable under this act, on account of producing gross proceeds, then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado.' Laws 1887, §§ 340-341, Mills' Ann. Stat. §§ 3222-3225. The construction of this statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the Supreme Court of the State, and we have no authority to review its determination of them. That court held that what was assessed was not the land on which the mining claim was located, but the claim itself, that is to say, the right of possession of the land for mining purposes. It is agreed that the Comstock Lode was a 'valid subsisting mining location,' and at the time of the assessment of the tax Wilhelmina Gude was the owner of the undivided interest in it which is in controversy here. Such an interest from early times has been held to be property, distinct from the land itself, vendible, inheritable and taxable. The State therefore had the power to tax this interest in the mining claim and enforce the collection of the tax by sale. The tax deed conveyed merely the right of possession and affected no interest of the United States."

O'Connell v. Pinnacle Gold Mines Co., 72 C. C. A. 645, 140 Fed. 854 (1905). 9th Circ. The possessory right of a locator of a mining claim, who has not applied for a patent and has done nothing to perfect title other than to do the annual assessment work, passes upon his death to his heirs by descent, and not as the designated donees or beneficiaries of the United States under the mining laws. The title of a purchaser of such a

claim at an administrator's sale duly made is therefore good as against the heirs.

Reed v. Munn, 80 C. C. A. 215, 148 Fed. 737 (1906). 8th Circ. "Mining claims are by the Colorado Statute (Mills' Ann. St. 456) declared to be real estate. This character of property possesses the quality of any other possessory title to land. It passes by inheritance, sale, mortgage or execution sale. 'Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator.' *St. Louis Min. & Mill. Co. v. Montana Min. Co.*, 171 U. S. 655, 43 Law. Ed. 320. So long as the locator or his assignee performs the required amount of work, his right of possession is exclusive against every person and against the United States. He may never obtain a patent, but when it does issue, it has relation back to the location. For the purpose of attack and defense he is the owner, and when this title passes from him to an assignee or grantee, it is protected in the hands of such assignee or grantee by the registration statutes of the state against an equitable claim thereto or interest therein not of record and unknown at the time of transfer."

Biglow v. Conradt, 159 Fed. 868 (1908). 9th Circ. "As against a mere intruder, the possession of a mining claim by a locator who has complied with the law is of itself sufficient to prevent the intruder, even upon a peaceful entry, from acquiring a right of possession." Defendant had located a claim and was proceeding to develop it, although he had not yet made an actual discovery. Plaintiff, who had an adjoining claim, entered upon defendant's claim for the purpose of setting out stakes to extend his lines. This was an intrusion and plaintiff did not acquire any right of possession to the overlap.

Johanson v. White, 160 Fed. 901 (1908). 9th Circ. One who in good faith makes his location, remains in possession, and with due diligence proceeds to make discovery, is fully protected against all forms of forcible, fraudulent, surreptitious or clandestine entries or intrusions upon his possession. But this rule is inapplicable where there is nothing to show that the second locator entered into possession secretly or by force or fraud or that the first locator took any steps to protect his possession. "Conceding that the location made by the plaintiff in error on May 25, 1905, unaccompanied by discovery at the time, gave to him the right subsequently to return and take possession of the claim after another had made due location thereof and taken possession for the purpose of exploration, the remedy of the latter was to protect his possession against the entry of the former. Both the locators being in possession by common consent, as they were after June 8th, it became a race of diligence between them to discover gold, and he who first discovered it undoubtedly obtained the prior right. His discovery did not relate back to the date of his location; but his location was made valid by discovery and took effect from that date, and it gave him the full right in the claim to the exclusion of all others." The case is governed by *Crossman v. Pendery* (see vol. 1, p. 321).

Bradford v. Morrison, 212 U. S. 389, 53 Law. Ed. 564 (1909), affirming 10 Ariz. 214, 86 Pac. 6 (1906). By the laws of Arizona a judgment is a lien

on the real property of the defendant in the county where the same is docketed. "The title of a locator to a mining claim is not only property, but it is property which, in addition to being sold, transferred and mortgaged, is also capable of being inherited, without in any manner infringing the title of the United States." Elsewhere in the statutes of Arizona, it is provided that the term "real property" includes mines and mining claims. A judgment, therefore, against an owner of an undivided interest in an unpatented claim, is a lien thereon, and it is not divested by a conveyance made before execution issues.

Hanson v. Craig, 95 C. C. A. 338, 170 Fed. 62 (1909), reversing 89 C. C. A. 55, 161 Fed. 861 (1908), 9th Circ. Plaintiffs located an association placer claim of 100 acres, having a width of 600 feet and a length of about two miles, without making a discovery. They sunk a shaft about six feet deep and then left the claim for the purpose of obtaining supplies for about a week, and then returned and continued to work until mineral was discovered. During their absence defendants located a claim which overlapped that of the plaintiffs and discovered mineral before the plaintiffs discovered it. The plaintiffs did not have such a possession of their claim as precluded the defendants from entering and making their location prior to the plaintiffs' discovery. The exclusive right to possession is conferred on one who has made a valid location, one of the essentials of which is a discovery. "Prior to that time all such mineral land is in law vacant and open to exploration and location, subject to the well established rule that no prospector is authorized by any form of forcible, fraudulent, surreptitious, or clandestine conduct to enter or intrude upon the actual possession of another prospector; for every miner upon the public domain is entitled to hold the place in which he may be working against all others having no better right." It is impossible to hold in this case that the plaintiffs had such a possession of their entire claim as precluded any other good faith prospector from peaceably going within the boundaries and himself making a discovery and location.

Jones v. Wild Goose Min. & Trading Co., 177 Fed. 95 (1910), 9th Circ. See this case on page 329.

Alaska.

Garside v. Norral, 1 Alaska, 19 (1888). "The interest which persons acquire in the mineral lands of the United States by locating claims thereon and doing the specific things required by the mining laws is not a chattel interest, nor any kind of personal property; it is an interest in real estate."

Tyce Consol. Min. Co. v. Langstedt, 1 Alaska, 439 (1902). "The Congress of the United States has enacted such laws for the disposition of the public mineral lands that, when a person makes a discovery of mineral, and thereupon so designates the boundaries of the tract or parcel claimed by him that the same may be readily traced upon the ground, he acquires a legal title to the land that is good against all persons except the United

States. His is not a mere inchoate right that may ripen into a title, but it is a present title, a present legal interest in the land, that he cannot be deprived of even by the United States without compensation. The miner's claim, when properly located under the acts of Congress, becomes a grant of a present legal interest, and as a title differs in every essential element from the equities that may be acquired by persons locating upon the public agricultural lands either under pre-emption or homestead laws and afterwards obtaining patent for the same. The farmer acquires in the public agricultural lands, even when he has paid his money for them, at most an equity; while the miner, under the acts of Congress for the disposition of the mineral lands as before stated, acquires a present legal interest and legal title from the inception of his claim. When he makes his discovery and location, so much of the public mineral lands as is properly covered by his claim is thereby severed from the great body of mineral lands of the United States, and is then no longer subject to location by any other person."

Binswanger v. Henninger, 1 Alaska, 509 (1902). A mining claim is real property, within the meaning of § 62, Civ. Code, which provides that all persons having undivided interests in real property are to be considered tenants in common.

Windmuller v. Clarkson, 2 Alaska, 298 (1904). Where a miner has made a discovery of gold on his claim, has marked its boundaries so that they can be readily traced and recorded the notice of location, all prior to the attaching of intervening rights, he has acquired a fixed property right and a title thereto good and complete against all the world, although the paramount title and the fee thereof is in the United States. His title can only be defeated by a failure on his part to comply with the mining laws, regulations and rules.

A court of equity will not adjudge the locator of a placer mining claim, who is in peaceable possession thereof under a clear record title, to be a trustee of that title and property for another, upon an alleged prior oral contract to locate it for the other, or to give him an interest therein, unless the case is established by full, clear and satisfactory evidence.

Redden v. Harlan, 2 Alaska, 402 (1905). Where A. staked and located a claim but made no discovery, and eleven months thereafter B. stakes and records the same ground and sinks a discovery shaft, the court will not enjoin B. from going on with his work. A. had not perfected his location and had no exclusive right to possession, and while a prospector in possession of a mining claim will be protected from trespass for a reasonable time, while he continues to search for mineral, equity will not aid those who sleep on their rights.

Bulette v. Dodge, 2 Alaska, 427 (1905). A. located a mining claim, marked its boundaries and recorded his certificate, but made no discovery and did nothing further for a year and a half. In the meanwhile B. took actual possession of the ground for the purpose of location, marked his boundaries, recorded his certificate, and while in good faith sinking a discovery shaft, A. again came upon the claim and began to sink a discovery

shaft. It was held that A. was a trespasser and could not by his trespass initiate a valid claim, and B. in an action to quiet title prevailed. "The first actual possessor and worker is first in law. The possession of the first actual occupant will be protected so long as he continues in good faith to work, in compliance with the mining laws, rules and regulations." "One cannot locate ground of which another is in actual possession under claim or color of right, because such ground would not be vacant or unappropriated."

Arizona.

Phillips v. Smith, 95 Pac. 91 (1908). See this case on page 397.

Arkansas.

Ware v. White, 81 Ark. 220, 108 S. W. 831 (1906). A mining claim in the adverse possession of another is not subject to relocation. Without deciding that B. had title, the court held that his possession and requisite annual assessment work under a defective location was sufficient to defeat a recovery on a patched relocation where there was no peaceable entry and possession of the land nor work done under it. If B. could peaceably hold possession against the world and do the requisite work for the required time, he would be entitled to a patent even without a valid location notice.

California.

Burns v. Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233 (1901). Defendants entered on public land of the United States to grade a site for a quartz mill, and plaintiff while working for them discovered a pocket of gold which he dug out with intent to appropriate it. The gold was taken from him by defendants. Held that defendants were liable for conversion. In the case of valuable mineral deposits, as of other articles found, the title of the first taker is prima facie good, and here the defendants can show no better right in themselves. They were on the land for a particular purpose which, in the absence of evidence to the contrary, must be presumed to have been temporary, not with the intention of acquiring ownership of the ground, and their occupancy therefore, while entitled to protection against unlawful intrusion, was insufficient to give title, real or presumptive, to the land. Indeed, even had the defendants intended to obtain title to the mill site, they could not have done so, for the land was not nonmineral.

Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 98 Am. St. Rep. 63 (1903). One who takes possession of land and does all that is necessary to constitute a valid location, except discover mineral, will be protected, while in good faith and with due diligence he prosecutes his work towards discovery, against all forms of forcible, fraudulent, surreptitious or clandestine entries and intrusions upon his possession; but if before he makes

discovery another in good faith makes a peaceable and open entry and discovers mineral, he will be entitled to the claim, upon completing his location. This case was affirmed in *Chrisman v. Miller*, 197 U. S. 313, 49 Law. Ed. 770, where the above point was not considered. See page 208, above.

Bakersfield & Fresno Oil Co. v. Kern County, 144 Cal. 148, 77 Pac. 892, 68 L. R. A. 193 (1904). The possessory right to a mining claim is property, and as such may be sold, transferred, levied upon, and is subject to taxation like other property.

Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23 (1905). See this case on page 398, below.

Gear v. Ford, 4 Cal. App. 556, 88 Pac. 600 (1906). After a valid location has been made the locator need not hold actual possession of the claim. His right of possession continues until he in fact abandons it or forfeits it by failure to do the requisite amount of work within the prescribed time, and the burden of proving such forfeiture or abandonment is on him who attacks this right.

Wolfskill v. Smith, 5 Cal. App. 175, 89 Pac. 1001 (1907). An oil company bored three wells on unsurveyed and unoccupied government land, and finding no oil or other mineral substance, abandoned the work. Subsequently it deeded to plaintiff all its right, title and interest in and to the land and wells. Later Smith took possession of part as a homestead under the laws of United States, and Myers located a right of way for a pipeline across part. Held, the oil company had acquired no right, title or interest in the land or wells which it could convey. Whatever right the company had terminated upon failure to discover oil and abandonment of the enterprise.

New England & Coalinga Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180 (1907). One who has posted notice and marked the boundaries of a placer claim but has made no discovery and has not retained possession of the claim for the purpose of prosecuting work looking to a discovery, has no right of possession as against others who may peaceably enter upon the land for the purpose of making a relocation. While one who is in actual possession of public land for the purpose of acquiring title thereto may, as against every one but the government, retain that possession, he loses his right by vacating the land, and then can only claim by virtue of a valid location.

Buchner v. Malloy, 155 Cal. 253, 100 Pac. 687 (1909). The interest of a locator in a mining claim on land owned by the United States has always been treated as virtually a title in fee, except as against the government. "Although the ultimate title in fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions, and all rights, interests and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated as between themselves and all persons but the United States as the owners of the land and the mines therein."

Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540 (1909). After a valid location has been made the locator need not keep actual possession of the claim. His right of possession will continue until he has in fact abandoned it or has forfeited it by failure to do the requisite amount of annual work.

Colorado.

Kirk v. Meldrum, 28 Colo. 453, 45 Pac. 633 (1901). "The fundamental principle governing the rights of parties to claims upon the public domain is that the bona fide occupant, for a purpose recognized by the law, is entitled to hold possession as against one subsequently attempting to initiate title to the same premises, unless the latter establishes a state of facts clearly demonstrating that the actual occupant is in possession without right."

Miller v. Hamley, 31 Colo. 495, 74 Pac. 980 (1903). Where the locator of a mining claim applies for, and obtains, a patent to only a part of his claim, including in such part his discovery shaft, he does not abandon thereby the excluded part of his claim; he may continue to hold this excluded part under a possessory title.

Moffat v. Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139 (1905). "One may not go upon a prior valid placer location, and prospect for unknown lodes, and get title to lode claims thereafter discovered and located in this manner within the placer boundaries, unless the placer owner has abandoned his claim, waived the trespass, or by his conduct is estopped to complain of it. * * * The principle stated applies to the relocation of a placer."

Montana.

Hamilton v. Huson, 21 Mont. 9, 53 Pac. 101 (1898). The right of possession comes only from a valid location. A plaintiff who makes no claim to a location cannot have such a possession of the ground as will entitle him to maintain an action for damages for cutting timber.

Bramlett v. Flick, 23 Mont. 95, 57 Pac. 869 (1899). Where one person enters upon the claim of another, whether the latter is in actual possession or not, and asserts ownership therein by virtue of an alleged superior title based upon a location, and exercises dominion over it to the exclusion of the rights of the owner, this amounts to an ouster. See this case also on page 283.

State v. Second Judicial Dist. Ct. of Silver Bow County, 24 Mont. 330, 61 Pac. 882 (1900). "Neither the statutes nor the courts in this state recognize any distinction between possessory rights to mining claims upon public lands, and real estate held under other titles. While recognizing the United States as the paramount proprietor, the legislature and the courts have always treated the claimant under a perfected location as the owner of the fee. Indeed, the location operates as a grant from the government; and the estate acquired under it is a vested right to the fee,

which becomes absolute upon the performance of the required conditions. It can be lost only by abandonment or by forfeiture and location by another. It is property, in every sense of that term, and, except in the particular just noted, it has all the attributes of real estate. It may be transferred by sale, as other real estate; it may be mortgaged; it may descend to the heir, or be held by the administrator or executor as assets to pay debts; it may be made liable to the payment of taxes; it is subject to statutory liens; in some instances it may be subject to the claim of homestead; and it is subject to levy and sale as other lands for the satisfaction of judgments. Hence the legislature has classed this species of property as real estate (Pol. Code, Sec. 16; Civ. Code, Sec. 4662; Code Civ. Proc. Sec. 3463), and has provided the same remedies for the protection and enforcement of rights pertaining to it, with the same forms of procedure, as it has provided for the protection and enforcement of rights pertaining to other real estate."

Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1 (1901). Unpatented mining claims are real estate, and a judgment duly docketed is a lien upon them. This lien, of course, can be divested by an abandonment of the claim subsequently to the docketing of the judgment, but a surrender of possession of the claim to one to whom the judgment debtor has sold it is not such an abandonment. Nor, when the judgment debtor or his grantee applies for a patent, should the judgment creditor adverse the application, for he is not yet in the place of the debtor, and further, his lien will be as good after the patent is obtained as it was before, under § 2332, Rev. St. U. S.

Gemmell v. Sicain, 28 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570 (1903). When one goes upon vacant mineral land of the United States to prospect for veins of mineral-bearing rock, and sinks shafts, and in an action is enjoined by the court from further prosecuting his search, he cannot secure an injunction against one who has trespassed on such land but not in the immediate vicinity of his shafts. Having as yet made no discovery, and therefore no location, he had merely the naked possession of the ground immediately about the shafts where he was prosecuting his work, and such possession was "possessio pedis" only, and could not be enlarged to include the entire amount of ground which he might have claimed under a location. "Until discovery is made, no right of possession to any definite portion of the public mineral lands can even be initiated. Until that is done, the prospector's rights are confined to the ground in his actual possession, and until that possession is disturbed, no right of action accrues, and even then no injunction would issue to restrain a mere trespass—certainly not in the absence of some showing of irreparable injury or the insolvency of the trespasser."

The fact that it was the trespasser who had originally enjoined the plaintiff from prosecuting his discovery work, and that, too, wrongfully, as determined by the court, did not alter the relative rights of the parties, or entitle the plaintiff to the injunction prayed. "Competing prospectors

cannot make use of the writ of injunction to secure priority of discovery or location on, or apparent superiority of right to, a mining claim."

Nevada.

Golden v. Murphy, 103 Pac. 394 (1909). One who is in actual possession of ground covered by a mining claim may support his right thereto by adverse possession alone, regardless of whether or not the land was subject to location as a mining claim.

New Mexico.

McAllister v. Hutchison, 12 N. M. 111, 75 Pac. 41 (1904). A., a married man, located a claim and conveyed it to B., who obtained a patent for it. A.'s wife subsequently secured a divorce, and then claimed that she was entitled to one-half the claim as her share of community property. Held that, after the conveyance to B., A. had no interest in the claim, and there was therefore nothing to which the wife's right could attach. "The rights, if any, that his said wife had in the mining claim could be of no avail until after he would have acquired title. Then her interest would have attached. But Henry McAlister never reached that position and therefore her anticipated interest perished when he abandoned said mining claim." "And if McAlister's possessory right to said mine was community property, the husband had the power to convey not only his interest, but the interest of his wife also. Ballinger on Community Property, Sec. 81. This was the last law until the passage of the act of 1901 by the Legislative Assembly of New Mexico." (See *Black v. Elkhorn Min. Co.*, 163 U. S. 445, 41 Law. Ed. 221, vol. 1, p. 323.)

Oklahoma.

Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936 (1903). One who discovers mineral signs or indications may assign and transfer his prospective discovery to one who may follow it up and make such discovery as to entitle the assignee to a valid location and finally a patent. See this case also on page 277.

Oregon.

Bishop v. Baisley, 28 Or. 119, 41 Pac. 936 (1895). See this case on page 345.

Herron v. Eagle Min. Co., 37 Or. 155, 61 Pac. 417, 48 L. R. A. 766 (1900). A locator in possession of a mining claim prior to his compliance with the provisions of the statutes of the United States, entitling him to a patent, has a mere right of possession or possessory title which is valuable and will be protected by law, but is not real estate or an interest in land within the meaning of the statute of limitations. (Mining claims are now real estate in Oregon by statute 2 B. & C. Ann. Codes, § 3979.)

South Dakota.

McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 50 L. R. A. 184 (1898). See this case on page 376.

Utah.

Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019 (1901). A mining location is not perfected until all of the essential statutory requirements are performed. A locator of a mining claim only acquires exclusive right to the possession of the claim when the location has been perfected, and, if he neglects to perform any necessary requirement within the time prescribed by statute, his attempted location is of no avail as against an intervening location peaceably and regularly made and covering the same ground, although he may have performed the neglected requirements after the inception of the second location.

Washington.

Phoenix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777 (1898). The estate which a locator holds in a mining claim is property in the fullest sense of the word and may be sold, transferred, mortgaged, inherited and sold on execution. Being, however, an equitable estate, the legal title remaining in the government, it is not subject to the lien of a judgment against the locator or his grantee. The Washington statute relating to the lien of judgments (§ 5132, Ballinger's Code), which makes the judgment a lien upon "the real estate of any judgment debtor," is construed to mean the fee simple title or estate of inheritance and not to include an equitable interest.

Davis v. Dennis, 43 Wash. 54, 85 Pac. 1079 (1906). Actual possession or occupancy of a validly located mining claim is not necessary to constitute possession as against a stranger entering without right where there has been no abandonment.

Wyoming.

Whiting v. Straup, 17 Wyo. 1, 95 Pac. 849, 129 Am. St. Rep. 1093 (1908). "Although a valid location is necessary to vest the legal right of possession in a claimant to land under the mining laws, yet possession without location is good as against a mere intruder. As a general rule, the mere naked possession will not avail against a valid location peaceably made, and hence it confers no right against a bona fide prospector, who enters upon the land peaceably for the purpose of acquiring title thereto as a mining claim. * * * But owing to the necessity of a discovery upon which to base the location of a mining claim, and the policy of the law to avoid breaches of the peace through conflicts between rival prospectors, the rule has been enunciated and may be regarded as well settled that where one seeks in good faith to make a location, he is entitled to exclusive possession

of the land sought to be located for a reasonable time to complete his location, or for such time as may be allowed by the customs or rules of miners, or the statutes of the state or territory. To be available for the purpose aforesaid, however, the possession, where that is alone relied on, must be actual and connected with active, diligent work of exploration, with the bona fide intention, if mineral is found, to make a location."

Phillips v. Brill, 17 Wyo. 26, 95 Pac. 856 (1908). It is a general rule that a mining location to be valid must be good when made and that a right cannot be initiated by a trespass.

Where one enters upon unappropriated land and performs all the acts necessary to location except discovery, no one else may claim the land which is in his actual possession. It is immaterial that a discovery under which he claims is on the boundary line of this claim and another, title to which had been claimed on the strength of the same well, since the only issue was whether his location and possession was prior to another's.

II. ACTION FOR THE POSSESSION OF MINING CLAIMS.

p. 331. Actions for the possession of mining claims must ordinarily be brought in the state courts. In the absence of jurisdiction by reason of the residence of the parties, the federal courts cannot take jurisdiction of these actions unless the complaint presents a question of the construction or meaning of an act of congress or the federal constitution. The mere fact that title is derived under the laws of the United States does not raise a federal question.

United States.

Wisc v. Nixon, 76 Fed. 3 (1896). C. C. D. Nev. The federal courts have no jurisdiction of an action to quiet title to mining claims where the complaint presents only issues of fact and does not raise any dispute as to the construction or meaning of the act of congress.

Gillis v. Downey, 29 C. C. A. 286, 85 Fed. 483 (1898). 8th Circ. Equity has jurisdiction of a bill to quiet title founded upon a possessory title to a mining claim. The general rule is that an equitable title will not support such a bill. Mining claims are an exception to this rule. Rev. St. 910.

Davidson v. Calkins, 92 Fed. 230 (1899). C. C. S. D. Cal. A bill to quiet title and restrain defendants from working a mining claim, where the defendants are in possession, cannot be maintained in the United States courts. There is an adequate remedy at law. These courts will not interfere with the distinction between law and equity.

Decey Min. Co. v. Miller, 96 Fed. 1 (1899). C. C. S. D. Cal. A bill in equity to determine conflicting rights in mining claims does not involve the construction or effect of any law of the United States and consequently does not give jurisdiction to the federal court.

California Oil & Gas Co. v. Miller, 96 Fed. 12 (1899). C. C. S. D. Cal. A bill in equity to quiet title to mining claims and restrain defendant from mining thereon does not involve a federal question, nor can jurisdiction be conferred upon the federal courts by inserting in such a bill allegations in regard to defendant's claim which are not essential to plaintiff's case.

A bill in equity to quiet title cannot be maintained in the federal courts against a defendant in possession although such a suit might be authorized by state law.

Peabody Gold Min. Co. v. Gold Hill Min. Co., 97 Fed. 657 (1899). C. C. N. D. Cal. A bill to quiet title to ground claimed by complainants, under location and by defendant under patent, does not raise a federal question. "Manifestly a claim of right based upon the mere location of a mining claim would not be sufficient for that purpose as against a patent regularly issued by the land department of the government under authority of law for the land covered by such location; and a bill of complaint setting forth such facts without any charge of fraud would be insufficient to state a cause of action, either upon a federal question or otherwise."

Fulkerson v. Chisna Min. & Imp. Co., 58 C. C. A. 582, 122 Fed. 782 (1903). 9th Circ. Under Rev. St. 910, providing that "no possessory action between persons in any court of the United States for the recovery of any mining title or for damages to any such title shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States, but each case shall be adjudged by the law of possession," and § 475, Alaska Code, providing that "any person in possession by himself or his tenant of real property may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest," one who first makes a valid location of a mining claim and enters into its possession acquires such a title thereto as the laws of the United States recognize and will protect as against intruders, and it is sufficient to support a bill to quiet title, although it is not the legal title. That remains in the United States. The general rule that the plaintiff must show a legal title, in order to maintain such a bill, is controlled by the above statutory provisions.

Walton v. Wild Goose Min. & Trading Co., 60 C. C. A. 155, 123 Fed. 209 (1903). 9th Circ. In an action of ejectment, the burden of proving that the plaintiff made a valid location is on him, but he need not show the performance of his assessment work; if this work were not done, the burden of showing this fact is on the defendant.

Beris v. Markland, 130 Fed. 226 (1904). C. C. E. D. Wash. Where, in an action to recover possession of a mining claim, neither party has a perfected right to have a conveyance of title from the government, and the requirements of the statute providing for adverse proceedings and suits for the determination of questions respecting conflicting claims under the mining laws have not been met, the court has no authority to adjudicate any question, save as to the parties' respective rights of possession; the parties cannot have a judicial determination of the question as to which shall ultimately prevail in a contest for the title.

In such a suit the plaintiff cannot prevail against the defendants if they had prior possession under color of title, and did not by actual force oust him from actual possession.

United States Min. Co. v. Lawson, 67 C. C. A. 587, 134 Fed. 769 (1904). 8th Circ. "The laws of Utah give a right of action in the courts of that state to quiet the title to real property without any previous adjudication of the title in an action at law, and without reference to the possession. Rev. Sts. 1898, Secs. 2915, 3511. This enlarged right is enforceable by a suit in equity in the federal courts when the complainant is in possession and the defendant is out of possession, or when both parties are out of possession, because in either case there is no adequate and complete remedy at law." The objection that the underground ore bodies are in the possession of the defendants, and not of the complainants, and that therefore the latter have an adequate legal remedy, is not tenable.

"Where the true owner of a mining claim is in possession of its surface, claiming title to the entire claim, his possession in legal contemplation extends to everything which is part of the claim, whether vertically beneath its surface or within the extralateral right granted by Congress, which is not in the actual possession of another holding adversely." *Boston & Montana Consol. Copper & Silver Co. v. Montana Ore Purchasing Co.*, 188 U. S. 632, 47 Law. Ed. 626, is distinguishable because in that case there was no allegation that complainant was in possession or that both parties were out of possession, and the suit was not one to quiet title, but to recover for ores extracted and to enjoin trespass.

Lockhart v. Johnson, 181 U. S. 516, 45 Law. Ed. 979 (1901), affirming *Lockhart v. Wills*, 9 N. M. 344, 54 Pac. 336. L., J. and P. entered into an agreement by which P. was to prospect and locate mining claims for the joint benefit of all the parties to the agreement. P. in pursuance of this agreement located a claim which he subsequently either abandoned or allowed to become forfeited. It was then relocated by J. and others. L. brought ejectment, seeking to show a conspiracy among P., J. and others to forfeit and relocate the claim. Held he could not recover. "When the four defendants who took possession of and relocated the mine went on the land on October 23, 1893, they found it vacant, and when they took peaceable possession of the vacant land before any resumption of work upon the claim by plaintiff or in his behalf, the latter's legal title, whatever it had been, ceased. It is not a case, therefore, of a prior possession under color of law or title being sufficient as against an ouster by a mere trespasser. There has been no ouster, but on the contrary a complete abandonment of possession. Whatever may be the equities of the plaintiff, in regard to this land as against the defendants, he has certainly no legal title to the mine or any part thereof, and in this purely legal action he must fail.

"In the courts of the United States in an action of ejectment the strict legal title must prevail, and if the plaintiff have only equities they must be presented and considered on the equity side of the court. * * *

The law of New Mexico is to the same effect. Compiled Laws of N. M., sec. 3160 and following sections.

"Whatever the rights of the plaintiff may be (and as to what they are we express no opinion) it is clear that on this record he cannot maintain an action of ejectment. If he have rights as a co-partner or co-tenant with P. and he claims that the acts of the latter inure to his benefit in any way, his rights under such circumstances can be enforced in equity. *Turner v. Sawyer*, 150 U. S. 578, 586, 37 Law. Ed. 1189.

"In relation to mining it has been held that the remedy in the case of a claim in the nature of that which the plaintiff herein sets up, is against the co-partner or co-tenant, by an action for a breach of his contract or to establish and enforce a trust in the claim as relocated against the parties relocating. *Saunders v. McKay*, 5 Mont. 523; *Doherty v. Morris*, 11 Colo. 12."

Lockhart v. Leeds, 195 U. S. 427, 49 Law. Ed. 263 (1904). A bill in equity having been filed by the plaintiff in the last case against the defendants therein to have them declared trustees, it was held that such an action could be maintained. "Neither plaintiff nor J. had ever had anything but a constructive possession through the possession of P., and when he fraudulently surrendered it to the other defendants and they entered and completed their location, the plaintiff could not then sustain ejectment, as we have already held. * * * Here we have already held in the ejectment suit (181 U. S. supra) that the relief is not to be had by ejectment, but must be obtained in equity if at all. Under the circumstances we think it immaterial whether P. surrendered possession before or after the expiration of ninety days from the discovery of the mine. All the acts of fraud set up in the bill committed by the defendants are, if proved, sufficient to entitle the plaintiff to treat them as trustees ex maleficio, and to recover from them as such trustees all the materials taken from the mine."

Cook v. Klonos, 164 Fed. 529 (1908). 9th Circ. In an action to quiet title to a placer mining claim, complainants' evidence showed that they entered upon the ground on March 22, 1905, located it the next day, recorded the location on April 17, sank a shaft and on April 15, 1907, discovered gold at a depth of 72 feet. There was no evidence that defendants had made any discovery on the premises prior to that time. There was evidence that there was a cabin on the claim, and that complainants had seen stakes and notices of other claims thereon, but there was no evidence that any of these belonged to or had been placed by the defendants. There was no indication that a shaft had been sunk. There was a small hole, but no evidence that it had been sunk by the defendants, or that gold had been found therein. No one was in possession when complainants entered. This was held to make out a prima facie case and did not justify a dismissal of the complaint. Discovery is the essential fact in determining the right of possession to mining ground. Priority of discovery gives priority of right against naked location and possession. "The evidence relating to these proceedings shows that the statute relating to the location of the claim had been followed very closely by the plaintiffs, and the inference to be drawn from the evidence relating to possession and discovery is that

the ground located by them was at the time of the location vacant and unappropriated public land of the United States."

Keely v. Ophir Hill Consol. Min. Co., 169 Fed. 601 (1909). 8th Circ. A statute of Utah provided that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." This statute is applicable to mining claims, but no action thereunder lies against the owner of an adjoining claim, in the absence of a discovered and known vein emanating from defendants' claim and extending under plaintiff's claim. The former cannot be said to be asserting an adverse claim in the latter.

Alaska.

Tyce Consol. Min. Co. v. Langstedt, 1 Alaska, 439 (1902). The locator of a claim has such a title as will support an action of ejectment. See this case also on page 385.

Arizona.

Kinney v. Fleming, 6 Ariz. 203, 56 Pac. 723 (1899). If one brings an action to quiet title to a mining claim before the expiration of the time allowed by statute for the filing of the notice of location with the recorder, the defendant need show only the acts of location relied on by him, independent of a certificate of location.

Clason v. Matko, 100 Pac. 773 (1909). Civ. Code 1901, par. 4105, provides that the complaint in a suit to quiet title must set forth the nature and extent of plaintiff's estate, describing the premises. A complaint stating in substance that plaintiff was the absolute owner against every one except the United States by deed from the locator, and making the location notice part thereof, with date and page of its record, fulfilled the statutory requirements both as to title and description, no objection being made to its sufficiency.

Phillips v. Smith, 95 Pac. 91 (1908). A complaint which alleges that because defendant and his grantors and predecessors never discovered any mineral on the claim of defendant, and because a valid location thereof was never made, the land covered by the pretended claim was vacant and unclaimed mineral lands of the United States subject to location, and that plaintiff claims the legal right to occupy and possess the premises and is entitled to the exclusive possession thereof by virtue of a compliance with the law, shows that the ground in controversy was unoccupied public mineral land open to plaintiff's location, and is a sufficient compliance with the statute.

A complaint which alleges that plaintiff entered on the grounds comprised within the mining claim of defendant "in a peaceful and lawful manner and explored said premises and discovered and found placer gold" is sufficient as against the objection that it shows on its face a forcible, clandestine

time entry by plaintiff to make his location, in the absence of anything in the complaint to support a conclusion that defendant's claim was occupied by him, since, if defendant was not in actual possession of the ground, plaintiff was within his rights in exploring.

California.

Harris v. Kellogg, 117 Cal. 484, 49 Pac. 708 (1897). In an action to recover a mining claim it is not necessary to allege plaintiff's citizenship, but if his title is based on a location under the law of the United States, he must prove citizenship or declaration of intention to become such.

Ramus v. Humphreys, 133 Cal. xx, 65 Pac. 875 (1901). Where plaintiffs in a suit to quiet title have located on land which they claimed had been abandoned, and are in possession of the same, defendants may not set up as a defense that the land was not abandoned when plaintiffs located on it, unless defendants claim under the first locator.

Goldberg v. Bruschi, 146 Cal. 708, 81 Pac. 23 (1905). In an action to quiet title to a mining claim, "when plaintiff made his proof of citizenship, and that he had made a discovery of gold bearing quartz in the land, and had shown a location according to the requirements of the law he established his case prima facie, and he was not called upon to make further proof that the land was unoccupied mineral land of the United States." It being shown to be public land, the presumption is that it is unoccupied, and the burden is then put upon defendant to show that the location under which he claims title is prior in time and superior in right. It is then plaintiff's right to show, in rebuttal, defendant's failure to do the required work, even though forfeiture be not averred in the complaint.

Mere possession of a claim, whether actual or constructive, without development work, following a location, is not sufficient to prevent a relocation.

Holmes v. Salamanca Gold Min. & Mill. Co., 5 Cal. App. 659, 91 Pac. 160 (1907). In an action of ejectment for an unpatented mining claim, the complaint contained the usual averments as to ownership, right of possession and ouster. The defendants having joined issue were entitled to prove any fact which would defeat plaintiff's title. They might, without specially pleading it, show a forfeiture by failure of plaintiff to do annual work and a location and possession by one of the defendants. If the original locator or his successor in title makes default in the performance of annual work, he no longer has the exclusive possessory right; the mere naked possession of the land does not give him any right as against a subsequent locator entering in good faith and making a valid location.

Colorado.

Sears v. Taylor, 4 Colo. 38 (1877). If the plaintiff in ejectment had actual possession of the premises, and the defendant entered upon them during such possession for the purpose of making a survey with a view to procure a government title, the plaintiff may recover.

"It is an elementary principle, having almost the force of a legal maxim, applicable to cases of this sort, that prior possession alone in the plaintiff will entitle him to recovery against a mere intruder, whose entry, as in this case, is without right or title. And it matters not in such case what is the character of the title declared on, whether in fee, or by virtue of local mining laws, or a right of possession generally."

"Had the appellant controverted the validity of the appellee's possessory right by setting up an adverse right of like nature, proof of compliance with the local laws on the part of the plaintiff below, as averred in his declaration, might then have become necessary."

"The prior possession of the plaintiff being uncontroverted, a legal presumption arose that he had complied with all the requirements of the *lex loci* peculiar to that mining district, necessary to the acquisition of the title upon which he had declared."

The plaintiff had not marked the exterior boundaries of the land claimed. He could, therefore, only recover so much of the land as he had improved, i. e., leveled or otherwise changed so that his possession was visibly marked, unless he had pointed out the boundaries of the claim to the defendant before or at the time of the alleged survey.

Mt. Rosa Min., Mill. & L. Co. v. Palmer, 26 Colo. 56, 56 Pac. 176, 77 Am. St. Rep. 245, 50 L. R. A. 289 (1899). The mere possessory title to mining claims is sufficient to support the action provided for in § 255 of the Civil Code of Colorado, which enacts that "an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest." "The estate acquired by the location of a mining claim is an interest in real property, and although the paramount title remains in the government, the courts have universally recognized such interest as a freehold, and in all controversies arising between the locator and other persons, as to any right or claim thereto, he is treated as the owner in fee."

Benton v. Hopkins, 31 Colo. 518, 74 Pac. 891 (1903). Where plaintiffs in an action of ejectment fail to establish a location which would entitle them to recover the premises, they cannot be heard to complain that the defendants' location of the claim was invalid in that the location certificate was not sufficient.

Jackson v. McFall, 36 Colo. 119, 85 Pac. 638 (1906). Section 267, Mill's Ann. St., provides: "If such plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, the State of Colorado or otherwise, the complaint shall contain a brief statement of such possessory claim, and whether the right claimed is by pre-emption or purchase, or by right of actual prior possession on the public domain of the United States." The following was held sufficient thereunder: "He has and claims the legal right to occupy and possess said premises, and is entitled to the possession thereof by virtue of a full compliance with the local laws and rules of miners in said mining district, the laws of the United States and the State of Colorado

by pre-emption and by actual prior possession as a lode mining claim, located on the public domain of the United States."

Idaho.

Buckley v. Fox, 8 Idaho, 248, 67 Pac. 659 (1902). Under a statute providing that aliens may acquire and hold title to mining claims, but not to other lands (Sess. Laws 1899, p. 70), it is not necessary in an action to quiet title to a mining claim to allege plaintiff's citizenship. This statute, however, does not apply in an action on an adverse claim under Rev. St. 2326.

Montana.

Hahn v. James, 29 Mont. 1, 73 Pac. 965 (1903). Where the evidence shows that the plaintiffs, in an action brought under § 1310, Code Civ. Proc., did not make a valid location of their claim, in order to succeed against a defendant who fails to show that he made a valid location, the plaintiff at least must show actual possession of the claim by personal presence thereon or by substantial enclosure.

New Mexico.

Lincoln-Lucky & Lee Min. Co. v. Hendry, 9 N. M. 149, 50 Pac. 330 (1897). In an ejectment where both parties are trespassers, plaintiff may recover if he can show prior possession in himself and a subsequent entry and ouster by defendant, whether that entry is on or under the surface. "We hold the rule to be the same as to all character of lands, and that there can be no distinction between an ouster upon the surface and an ouster beneath the surface, except in cases arising under the mining laws by virtue of section 2322, Rev. St."

Oregon.

Bishop v. Baisley, 28 Or. 119, 41 Pac. 936 (1895). Where a person endeavoring to establish a location upon a claim whereon there has been a prior location seeks to prove that the right under such prior location is forfeited for failure to perform assessment work, he must specially plead such forfeiture. Unless so pleaded, it may not be given in evidence.

Crown Point Min. Co. v. Crismon, 39 Or. 364, 65 Pac. 87 (1901). A plaintiff in actual possession of a mining claim may bring a bill in equity to determine an adverse claim and to quiet the plaintiff's title under Hill's Ann. Laws, § 504.

Utah.

Silver City Gold & Silver Min. Co. v. Lowry, 19 Utah, 334, 57 Pac. 11 (1899). A court having obtained jurisdiction of all parties to an adverse suit for possession of a mining claim may grant full relief and restore possession to the party entitled thereto.

Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 Pac. 1019 (1901). "As the defendants were in actual possession at and before the institution of this suit under a location the validity of which was attacked by the plaintiff only on the ground of the previous location of the Copper Globe No. 4, the burden was upon the plaintiff to show that the previous location was made and perfected in compliance not only with the laws of the United States, but also with such provisions of the statutes of the state relating to the location of mining claims as are not inconsistent with the United States statutes."

Washington.

Protective Min. Co. v. Forest City Min. Co., 51 Wash. 643, 99 Pac. 1033 (1909). In an action to quiet title to a mining claim against a prior locator, plaintiff is not required to allege an actual discovery of minerals on the claim, or to excuse absence of such allegation by suggesting a relocation of an abandoned claim; it is enough to allege ownership and possession and defendant's adverse claim. And though discovery is not proven, a defective location notice, when coupled with possession gained under peaceable entry, is sufficient color of title to warrant recovery, defendant having no legal rights in the claim.

National Mill. & Min. Co. v. Piccolo, 54 Wash. 617, 104 Pac. 128 (1909). "In an action to recover possession of a mining claim the complaint need not be different from that required in possessory actions generally. It is sufficient to allege ownership and right of possession, and that the defendant wrongfully entered thereon." "The means by which the possessor is entitled to possession are matters of evidence." It is not, therefore, necessary to allege the performance of the acts constituting a valid location.

In possessory actions to recover unpatented mining claims, the rule of ejectment that the plaintiff must recover on the strength of his own title and not on the weakness of his adversary's does not apply. In actions of this sort the better title prevails.

The defendant in such an action who ousted the plaintiff who had been in possession for eight years cannot take advantage of technical insufficiency in the description in the location notice which could not and did not mislead him.

III. CONVEYANCE OF MINING CLAIMS BEFORE PATENT. STATUTE OF FRAUDS.

p. 338.

United States.

Scheel v. Alhambra Min. Co., 79 Fed. 821 (1897). C. C. D. Nev. "A tunnel right through a specific piece of ground is a right to enter upon and occupy the ground for the purpose of prosecuting work in the tunnel, and to extract therefrom waste rock or earth necessary to complete the running

of the tunnel, and making such use thereof, after completion, as may be necessary to work the mining ground or lode owned by the party running the tunnel. By implication the grant of such a right carries with it every incident and appurtenant thereto including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right, such right or easement being necessary for the full and free enjoyment of the tunnel right."

St. Louis Min. & M. Co. v. Montana Min. Co., 171 U. S. 650, 43 Law. Ed. 320 (1898). "Where there is a valid location of a mining claim the area becomes segregated from the public domain and the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he may sell it, mortgage it or part with the whole or any portion of it as he may see fit."

Snow v. Nelson, 113 Fed. 353 (1902). C. C. D. Nev. It is assumed by the court in this case that an agreement for the conveyance of a mining claim before patent obtained must be in compliance with the statute of frauds.

Colorado.

Scars v. Taylor, 4 Colo. 38 (1877). Title by occupation is an interest in real estate "under our statute," and is the subject of conveyance by deed. It cannot be conveyed by parol.

Montana.

Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1 (1901). See this case on page 390, above.

South Dakota.

Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943 (1898). An agreement to locate a mining claim in the name of one, for the benefit of or in trust for another, is, if made prior to the location, valid, though not in writing. But after the location is in fact made the claim becomes real property, and no agreement to convey it, or any part of it, and no declaration of trust in regard to it, would be binding upon the locator, unless evidenced by writing within the terms and requirements of the statute of frauds.

Washington.

Phoenix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777 (1898). Under the laws of the United States, the estate which a locator has in a mining claim may be conveyed by himself alone without his wife becoming a party thereto, and the Washington statute (Ballinger's Code, § 4491), which requires both husband and wife to join in the conveyance of community real estate, must be construed as having no application to the estate which is held by such locator.

CHAPTER XIV.

THE PATENT.

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| <ul style="list-style-type: none">I. Obtaining the Patent. A. Expenditure. B. Survey. C. The Application Papers.<ul style="list-style-type: none">(a) The Application.(b) Proofs Which Must Accompany the Application.(c) Posting and Publication. | <ul style="list-style-type: none"> D. Entry. E. Affidavits and Proofs. F. Action by the Land Office and Issue of Patent. G. Hearings as to Character of Land.II. Adverse Claim and Action Thereon.III. Effect of the Patent.IV. Vacation of Patent. |
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I. OBTAINING THE PATENT.

A. *Expenditure.*

pp. 347, 348. In the interval since the publication of the first volume of this work, the land department has made two important changes in its construction of that part of Rev. St. 2325 which relates to the filing of the surveyor general's certificate as to expenditure upon the claim.

First. The rule laid down in the circular of December 14, 1885 (4 L. D. 374), that if the application embraced several claims it was not necessary that \$500 worth of improvements be put upon each claim, but the expenditure of \$500 was sufficient for the group, was changed in the regulations of December 15, 1897 (25 L. D. 561), par. 53, of which, as amended March 14, 1898 (26 L. D. 378), is the same as par. 48 of the present regulations. The certificate must now show that \$500 worth of labor has been expended or improvements made on each claim, or if the application embraces several claims held in common, that an amount equal to \$500 for each claim has been expended upon and for the benefit of the entire group. Not only is this construction justified by the language of the statute, and required, in order that the

system might be uniform, but a necessity for the change in the rule arose from the abuse to which it was subject (27 L. D. 91). Fairness, however, to those who had already filed applications or were about to do so, required that the exception contained in the proviso should be made in their favor.

Second. The previous ruling that the requirement that the certificate of expenditure must be filed within the period of publication was mandatory has been revised. That provision of the statute is now held to be directory. The question involved in the proof of expenditure lying between the applicant and the government and not affecting third parties, such proof may be considered by the department although filed after the expiration of the period of publication. But it would seem that the expenditure must have been previously made.

Since it is a question between the government and the applicant only, it cannot come into controversy in the courts, but is exclusively for the land department. In this it is essentially different from annual work. That being a condition of the retention of possessory title, and in no sense a condition of obtaining title, the department does not concern itself therewith. The former rule that proof of the performance of annual work must be made as a part of the "compliance with the terms of this chapter" (4 L. D. 374. See vol. 1, p. 349) no longer prevails.

In the case of placer claims on surveyed land, a survey is of course unnecessary. The department consequently does not in this case require proof of expenditure by certificate of the surveyor general, but will permit the expenditure to be shown by other satisfactory evidence.

United States.

United States v. King, 27 C. C. A. 509, 83 Fed. 188 (1897). 9th Cir. "The surveyor general was required by law to furnish the certificate as to the character and value of the labor performed and improvements made upon the claim. The sufficiency of such labor and improvements was a matter to be determined by him from his own observations or those of his deputy or from the testimony of persons having knowledge of the subject."

Willitt v. Baker, 133 Fed. 937 (1904). C. C. W. D. Ark., Harrison Division. After an adverse claim is filed it is not necessary for the adverse claimant to file the certificate of the surveyor general of the United States showing that he has expended \$500 worth of labor or made that value of

improvements on the claim, as required by Rev. St. 2325, until the suit brought in support of the adverse has been determined. But he cannot be permitted, after the determination of such suit, to perform the assessment work for preceding years, or to perform the \$500 worth of work, which is essential to enable him to procure a patent.

Montana.

Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833 (1904). In an action brought in support of an adverse claim filed against an application for patent to a mining claim, the question as to whether the applicant had placed upon the claim \$500 worth of work or improvements cannot come into controversy, but is a question exclusively for the land office, and the applicant may complete such work and improvements at any time before actually making his final entry in the land office.

LAND OFFICE DECISIONS.

The affidavit accompanying the application stated that "said improvements consist of reservoirs and ditches and mining tools on said claim, also tail race." This is not sufficiently full and explicit. Mining tools cannot be considered as part of the expenditure. The improvements should be itemized. The applicant was given an opportunity to show what the improvements were and their value. *Adams v. Quijada*, 25 L. D. 24 (1897).

The requirement that proof of expenditure shall be filed during the period of publication is directory only and not mandatory as to time; proof filed after the expiration of that period, showing expenditure made in due time, will be considered. *Little Pet Lode*, 4 L. D. 17, and *Milton v. Lamb*, 22 L. D. 339, overruled.

In the case of a placer claim upon surveyed land, proof of expenditure need not be made by certificate of the surveyor general. Proof by affidavits of credible witnesses is sufficient.

"This claim being located upon surveyed lands and conforming to legal subdivisions, no further survey or plat is required, and the special reason for requiring the certificate of the surveyor general in lode claims does not exist. To require such a certificate would be to put the claimant to a considerable expense for the services of a deputy mineral surveyor who would have no duty to perform but to examine and report on the labor and improvements." *Draper v. Wells*, 25 L. D. 550 (1897), followed in *Leppert v. Montgomery*, 26 L. D. 122 (1898).

On a showing of an expenditure for the common benefit of several locations embraced in one application, the department will not undertake to determine whether such a plan of development will be effective or not, if it appears that the expenditure was made in good faith and for the purposes alleged. *Hughes v. Ochsner*, 26 L. D. 540 (1898); *Id.*, 27 L. D. 393.

Where expenditure is done upon an adjoining claim belonging to applicant, of which the surveyor general makes a descriptive return, the office will require a certificate of the surveyor general as to the statutory ex-

penditure. "Even if this claim is one of a group belonging to the applicant, the fact is that this is an independent application for a patent which does not include any other claim. Mining work done on one claim for the benefit of that and other adjoining claims constituting a group with a common ownership may be credited to the adjoining claims as well as to the claim on which the work is actually done, but the fact that such work has been done and its relation to the claim sought to be patented must be fully shown." *Clark's Pocket Quartz Mine*, 27 L. D. 351 (1898).

The expense of keeping a watchman to care for the works, machinery and buildings of a developed mine which has been worked, but in which mining operations have been temporarily suspended, may be properly included in annual expenditures (*Lockhart v. Rollins*, 2 Idaho, 503, 21 Pac. 413, vol. 1, p. 276, followed). Where the compensation of such watchman was the use and occupation of a building on the property, the value of this use can be allowed as a credit on the assessment account. *Tripp v. Dunphy*, 28 L. D. 14 (1899).

Where an application for patent embraces several locations held in common, and is made and passed to entry prior to July 1, 1898, proof of expenditure of \$500 on the group is sufficient under amended rule 53, Mining Regulations (26 L. D. 378). *Robert S. Hale*, 28 L. D. 524 (1899); *Mayflower Gold Min. Co.*, 29 L. D. 7 (1899); *Brady's Mortgage v. Harris*, 29 L. D. 89 (1899).

Improvements located on the ground of conflicting and excluded claims cannot be included in the estimate of expenditure. *Hidden Treasure Lode*, 29 L. D. 156 (1899). But in consideration of the apparent good faith of the applicant, who by reason of the exclusion of the conflict has lost work upon which he relied, he is allowed nine months within which to make the necessary expenditure and file the certificate of the surveyor general in proof thereof with a view of submitting the entry to the board of equitable adjudication. *Hidden Treasure Lode*, 29 L. D. 315 (1899).

The statutory requirement that proof of expenditure to the amount of \$500 shall be filed during the period of publication is directory only, not mandatory; proof filed after the expiration of that period, showing expenditure in due time, may be considered. *Nielson v. Champagne Min. & Mill. Co.*, 29 L. D. 491 (1900).

The proviso to rule 53 has no application where the failure of applicant to pass to entry before July 1, 1898, is due to his delay in furnishing the surveyor general's certificate as to expenditure. *Augusta Schlusserger*, 29 L. D. 495 (1900).

The proviso to Rule 53, Mining Regulations, is not applicable if the records fail to show that the application was prevented from being passed to entry prior to July 1, 1898, by protest or adverse claim. *B. P. O. E. Gold Min. Co.*, 29 L. D. 605 (1900).

The fact that requisite expenditure is not shown to have been made prior to the expiration of the period of publication is immaterial, where a new notice is subsequently published and posted under which proof of expenditure is regularly furnished. *Rex Lode Claim*, 29 L. D. 635 (1900).

The performance of annual labor is not a condition of obtaining patent. See following cases on page 349. *McEroy v. McGginson*, 29 L. D. 164 (1899) ; *Opie v. Auburn Gold Min. & Mill. Co.*, 29 L. D. 230 (1899) ; *R. Wolenberg*, 29 L. D. 302 (1899) ; *Nielson v. Champagne Min. & Mill. Co.*, 29 L. D. 491 (1900).

"From the authorities cited and considerations stated, the following conclusions are fairly deducible:

1. Labor and improvements, within the meaning of the statute, are deemed to have been had upon a mining claim, or upon several claims held in common, when the labor is performed or the improvements are made in order to facilitate the extraction of minerals from the claim, or the claims in common, as the case may be, though such labor and improvements may in fact be outside the limits of the claim, or claims in common, or on only one of the several claims held in common.

2. In order that labor performed or improvements made upon one of several mining claims held in common, or upon ground outside the limits of such claims, may be accepted in satisfaction of the statute as to all the claims so held, such claims must be adjoining or contiguous, so that each claim thus associated may be benefited by the work done or improvements made.

3. Where expenditure in labor or improvements relied on is had on one only of several adjoining or contiguous claims held in common, it is incumbent upon the applicant for patent to the claims so held to show that such expenditure was intended to aid in the development of all the claims, and that the labor and improvements are of such a character as to redound to the benefit of all.

4. Where the labor and improvements are not upon the claim, or upon any of several adjoining or contiguous claims held in common, but outside thereof, it is likewise incumbent upon the applicant for patent to such claim or claims in common to show that the labor and improvements were intended to aid in the development of the claim, or claims in common, as the case may be, and are of a character suitable for the purposes intended.

5. Labor or improvements intended for the common benefit of several noncontiguous mining claims cannot be apportioned to the different claims in satisfaction of the required expenditure thereon, for the reason that to do so would be to credit each claim with an expenditure made in part for the benefit of other claims not associated therewith as claims held in common within the meaning of the law." *Copper Glance Lode*, 29 L. D. 542 (1900).

Under amended regulations of March 14, 1898 (26 L. D. 378), it is sufficient, in the case of an application embracing several locations held in common, to prove before the period of publication has terminated an expenditure of \$500 on the group, if the application would have passed to entry before July 1, 1898. Where publication of notice of an application would not have been completed until July 2, 1898, the fact that an adverse is filed June 29, 1898, does not bring the application within the exception. The delay in publication would have prevented the application from passing

to entry on July 1, 1898, even had no adverse been filed. *Tenderfoot & Other Lodes*, 30 L. D. 200 (1900).

Where a person relocates a claim, on which a tunnel has been driven of the value of \$500 or over a long time before, for the benefit of another claim, such relocater may not pay \$500 to those who drove the tunnel, but who have lost all right to the land wherein it is, and have that \$500 considered as the \$500 worth of "labor expended or improvements made upon the claim by himself or grantors," required by Rev. St. 2325. *Yankee Lode Claim*, 30 L. D. 289 (1900).

Work done on a claim by a locator who subsequently abandoned the claim cannot be credited to a subsequent locator as part of the \$500 worth of work required to be done by the claimant or his grantors, under Rev. St. 2325.

A tunnel lying wholly within the excluded portion of an application for patent to a mining claim, which does not tend to the development of any part of the claim not excluded and would not tend thereto if extended along its course according to the original plan, as it would continue in excluded ground until it passed without the exterior limits of the claim, cannot be included as part of the required \$500 worth of work. *Russell v. Wilson Creek Consol. Min. & Mill. Co.*, 30 L. D. 322 (1900).

The value of a tunnel driven for the purpose of developing and working a number of contiguous claims owned by the same person may be credited to the \$500 worth of labor expended or improvements made to fulfill the requirement of Rev. St. 2325, even though all the claims be not embraced in the same application or entry and even though the work were not done for the purpose of complying with the requirement of § 2325. The rule applicable to work done to comply with this section is the same as that governing Rev. St. 2324, in regard to annual assessment work, viz., that where "the same person or company owns several contiguous mining claims capable of being advantageously worked together, and one general system has been adopted for the purpose of developing them all, the value of the work done and improvements made annually for their development pursuant to such system, whether done on only one of the claims or outside of all of them, is available toward meeting the requirement as to annual expenditure for the several claims." *Zephyr & Other Lode Min. Claims*, 30 L. D. 510 (1901).

A quartz mill situate on other mining lands of the applicant, half a mile distant from the claims embraced in the entry, cannot be accepted as an improvement made for the benefit of those claims within the meaning of the statute. "Labor or improvements to be so credited must actually promote or directly tend to promote the extraction of mineral from the land, or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the mining works thereon or pertaining thereto." Subject to this general rule, the determination in each case must depend upon the facts of that case. *Highland Marie & Manilla Lode Min. Claims*, 31 L. D. 37 (1901).

An excavation made upon one of a group of placer claims, containing a deposit of marble so near the surface as to be most advantageously removed by quarrying, is not such an improvement as will be accepted as expenditure for the group of claims.

"It is now well settled that improvements made upon one or wholly outside of several claims held in common are acceptable in satisfaction of the statutory requirements only where the claims are contiguous and where such improvements tend to facilitate the extraction of the minerals contained in the claims. The situation disclosed in most of the decided cases is that of a shaft sunk upon or tunnel driven from one of the claims, or without the group, to reach the veins or ledges of each at a depth which would render the cost of separate shafts or drifts excessive and sometimes prohibitive; or of the construction of a flume and the introduction of water, for the purpose of washing placer minerals from each claim. But, whether lode or placer, it must appear that the entire group will integrally profit by the work done upon one or more (or wholly outside) of such claims. The labor or improvements so performed or made must be of such character as to promote the development of each claim. (See *Smelting Co. v. Kemp*, 104 U. S. 636, 655, 26 Law. Ed. 875; *Jackson v. Roby*, 109 U. S. 440, 445, 27 Law. Ed. 990.)

"It is manifest that the surface excavation or open cut made upon claim No. 4 of the Kosciusko Group does not bring the remaining claims any nearer development than they were prior thereto. The deposit of marble is shown to be superficial—covered by at most but a few feet of soil—and plainly susceptible of removal only by means of quarries. In the very nature of such a form of deposit actual work upon the surface of such a claim is indispensable to the extraction of the mineral which composes the deposit. Neither by shafts, tunnels, flumes nor any of the methods used in the development of a group of lode or ordinary placer claims can such superficial formation be practically mined. The quarry opened upon claim No. 4 has no tendency to facilitate the extraction of the mineral of its companion claims, but obviously tends to the development of that claim alone; and, as said in *Jackson v. Roby*, supra, 'The law does not apply to cases where several claims are held in common, and all the expenditures made are for the development of one of them without reference to the development of the others.'" *Elmer F. Cassel*, 32 L. D. 85 (1903), followed in *Schirm-Carcy & Other Placers*, 37 L. D. 371 (1908).

Improvements for the common benefit of a number of claims will not avail as expenditures for a claim some of the co-owners of which have no interest in the other claims. They do not constitute a group of claims "held in common" within the meaning of Rev. St. 2324. *Black Lead Lode Extension*, 32 L. D. 595 (1904).

"An aggregate expenditure in labor or improvements upon one of several contiguous claims held in common is acceptable in satisfaction of the statutory requirement only when such expenditure actually promotes, or directly tends to promote, the practically contemporaneous development of all the claims concerned. A scheme of successive development of such

claims, in the absence of an expenditure for the direct benefit of each, is not within the spirit of the privilege accorded by the statute, as it does not directly tend to facilitate the extraction of mineral from each claim at the time the expenditure therefor is made." *Wood Placer Min. Co.*, 32 L. D. 401 (1904).

The requirement as to expenditure is not dispensed with where the application is based on a claim under the statute of limitations, for which provision is made in Rev. St. 2332. *Capitol No. 5 Placer Min. Claim*, 34 L. D. 402 (1906). This overrules *J. P. Sears, Copp*, 312, vol. 1, p. 351.

The cost of the construction of such portions of wagon roads, used for the transportation of supplies to, and ore from, the claims, as extend beyond the boundaries of the claims, will not be accepted as expenditure upon the claims. "The connection between the outlying portions of the roads and active mining operations or development is too remote to justify their acceptance as a credit." *Douglas & Other Lodes*, 34 L. D. 553 (1906).

"It is well settled that improvements made upon one or more of several contiguous claims held in common may be accepted in satisfaction of the statutory requirement only where the purpose of such improvements is to facilitate the extraction of mineral from the claims, and the improvements are of such character as to redound to the benefit of all claims in this respect. It must appear that each one of the claims constituting the group will profit by the work done or improvements made upon one or more of such claims.

"Assuming that the mineral exists in a practically continuous mass in the body of the mountain and extends under the surface of the entire group of claims embraced in the entry, it does not appear how the tunnels relied upon, which are projected away from and at a point high above the surface of the excluded claims, could in any manner aid in the extraction of mineral from such excluded claims, or could tend to promote their development. The tunnels if continued in their projected courses would not reach the deposit under the surface of the excluded claims, and could not by any possibility be utilized for their benefit." They do not therefore satisfy the statutory requirement. *Lawson Butte Consol. Copper Mine*, 34 L. D. 655 (1906).

"Where several contiguous mining claims are held in common and expenditures are made upon an improvement which is intended to aid in the development of the claims so held, and which is of such character as to redound to the benefit of all, such a general improvement is called a common improvement. In legal contemplation these terms import a single, distinct entity, not subject to physical subdivision or apportionment in its application to the claims intended to be benefited by it. The entire body of claims held in common, the group as it is ordinarily denominated, not the individual claims separately considered, is the beneficiary on the one hand, while on the other the common improvement in its entirety is the means or agency effecting the common development or the community benefit." In this case 23 claims were embraced in the group, and the common im-

provement, a main shaft, was valued at \$4,600. It was sought to credit \$200 each to 14 claims, \$300 each to 6, and nothing to the rest. "Such a method of arbitrarily adjusting the credit to be derived from a common working shaft merely as the exigencies of the case seem to require is destructive of the essential idea inherent in the term, a common improvement. To undertake to set apart or apportion a physical segment or section, or an arbitrary fractional part, of a common improvement, and accredit the value thereof to a particular claim, is in violation of the theory of a common benefit accruing from a common improvement." There was accordingly credited \$200 to each claim.

In these cases the department should be fully advised as to the total number of claims embraced in the group, as to their ownership, and as to their relative situations, properly delineated upon an authenticated plat or diagram. *James Carretto & Other Lode Claims*, 35 L. D. 361 (1907); *Mountain Chief No. 8 & Mountain Chief No. 9 Lode Min. Claims*, 36 L. D. 100 (1907).

A stamp mill, even though located upon and used exclusively in connection with the claim, cannot be accepted as an improvement thereon. It in no way directly facilitates the extraction of minerals therefrom, or contributes to its development as a mine. *Monster Lode Min. Claim*, 35 L. D. 493 (1907).

"Only with respect to the actual production of salt, by the usual processes, could a saline spring or deposit be consistently regarded as within the purview of the mining laws. The installation of bath houses and appurtenances, to which the salt water of the springs is led by conduits and there used for bathing purposes, cannot be said to be in any respect or feature mining, and those utilities cannot be regarded as in any sense mining improvements." *Lovely Placer Claim*, 35 L. D. 426 (1907).

The right of an owner of a vein to follow it on its dip outside his side lines does not include the right to use the sub-surface of the land of the adjoining owner to run drifts for the purpose of reaching or developing another claim. Such drifts will not therefore be considered as expenditure upon the latter claim. *Patten v. Conglomerate Min. Co.*, 35 L. D. 617 (1907).

Improvements made prior to the location of the claim or claims to which their value is sought to be accredited are not available toward meeting the requirements of the statute relative to expenditures. *Tough Nut No. 2 & Other Lode Min. Claims*, 36 L. D. 9 (1907).

"There is no reason why an owner of a group of contiguous mining claims and of an improvement constructed for their common development and effective to that end, and of sufficient value for patent purposes as to the entire group, may not, instead of embracing all the claims in one application for patent, apply for and obtain patent to a portion of such claims, based upon their due share or interest in the common improvement; and a subsequent break in the common ownership by a sale or other disposition of one or more of the patented claims, or of any interest therein, would furnish no bar to later patent proceedings for the remaining claims of the

group based upon their due share or interest in the same common improvement. If the right to a patent for the entire group be in fact earned by the construction of a common improvement of a character and value effective and sufficient for that purpose, it can make no difference that patent for all the claims is not applied for at one time, or that a part may be patented and disposed of before patent to the remainder is applied for." *Mountain Chief No. 8 & Mountain Chief No. 9 Lode Min. Claims*, 38 L. D. 100 (1907).

The application embraced fourteen claims for which there was shown a common improvement or system which was begun after the location of eight of the claims, but before the location of the other six. The total value of the improvement was \$11,000, of which \$7,000 had been expended before the location of the last six claims and the balance afterwards. This was held to be sufficient. It was not necessary to apportion the expenditure made after the location of the six claims among the entire fourteen. "If the requisite benefit to the group is shown, or to the extent of such of the claims as are so benefited, and the elements of contiguity and common interest in the claims concerned appear; if the improvement represents a total value sufficient for patent purposes for the number of claims so involved; if for each claim located after the partial construction of the improvement the latter has been subsequently extended so as to represent an added value of not less than \$500, each is entitled under the law to a share of the value of the common improvement in its entirety, no claim receiving more or less than another from that source, participating therein without distinction or difference; and as to each the statutory requirement in that behalf is satisfied." *Aldebaran Min. Co.*, 36 L. D. 551 (1908).

A lime kiln erected on a placer claim containing a deposit of limestone cannot be accepted as an improvement. Like the stamp mill in *Monster Lode M. Claim*, above, it does not facilitate the excavation of the limestone or the development of the mine as such.

Roads cannot be treated as improvements where it is not made to appear that they have any connection with actual mining operations conducted on the claims for which application is made. *Schirm-Carey & Other Placers*, 37 L. D. 371 (1908).

No part of a wagon road lying partly without and partly within the limits of a group of claims will be accepted as an improvement thereon. "If the outlying portion of such a road is, for the reason stated in that decision (*Douglas and Other Lode Claims*, above), unavailable in patent proceedings as a mining improvement, a portion of such a road lying within a claim would seem to be equally unavailable; for it is manifest that the latter portion, if used only for the purpose of transporting supplies to, and ore from, a claim, is no more intimately connected with active mining operations thereon than would be a portion of the same road, similarly used, lying outside the limits of the claim." This was the only purpose for which it was alleged that the road in this case was constructed or used. *Fargo Group No. 2 Lode Claims*, 37 L. D. 404 (1909).

Where a placer claim, or a group of such claims held in common, contain deposits of such character and extent as to permit their being worked

more economically by dredging than by any other means, a dredge which has been purchased in good faith and is actually used for the exclusive purpose of working such deposit, and which has not been used as the basis for patent for any other area, may be counted as an improvement, and its cost may be accredited to that particular claim or group. *Garden Gulch Bar Placer*, 38 L. D. 28 (1909).

B. Survey.

p. 353. Where an application is made for a placer claim which is on land already surveyed, and conforms to legal subdivisions, no further survey or plat is necessary; but where the claim is for a fractional part of a subdivision, a survey is required. See Land Office Regulations of March 29, 1909, pars. 34-38, 89-94, and 115-169.

Montana.

Basin Min. & Concentrating Co. v. White, 22 Mont. 147, 55 Pac. 1040 (1899). Where one, intending to apply for a patent, employs a United States deputy surveyor who by mistake excludes from the survey a portion of the claim, but as soon as he discovers the mistake, has an amended survey made, a patent for the entire claim will be granted to him, notwithstanding the adverse claim of one who located on the excluded portion of the claim and made improvements thereon and applied for a patent therefor before the amended survey was made. "We know of no principle of law by which the owner of a mining claim seeking a patent can be deprived of his property because of an error by a United States surveyor in the survey, which the owner in good faith takes steps to cure, and does cure, by permission of the interior department within a few days after his discovery of its existence."

LAND OFFICE DECISIONS.

The survey of a claim is not vitiated by the fact that the connecting line with the public survey is more than two miles long, where each corner is connected with other claims that have been officially surveyed. *S. H. Standart*, 25 L. D. 262 (1896). But see L. O. Regs. par. 36.

A patent for a placer claim should describe the ground to be conveyed with mathematical accuracy, and where such accuracy cannot be obtained under an application which embraces lands theretofore surveyed and returned in irregular "lots," an additional survey will be required. *Holmes Placer*, 26 L. D. 650 (1898), affirmed 29 L. D. 368 (1899).

To include land properly subject to location the survey of a claim may be extended entirely across an excluded prior location and the end line

established within an excluded junior location. *War Dance Lode*, 29 L. D. 256 (1899).

The claim applied for was intersected by other claims subsequently located, but excluded from the application so that to the west of these there was only a small triangle not excluded. "The ground within the said triangle appears to have been lawfully embraced within the H. T. location and is still claimed thereunder, and to hold such ground the lines of survey of that claim may be laid upon the surface of said conflicting and excluded claims." *Hidden Treasure Lode*, 29 L. D. 156 (1899).

Where more than one claim is embraced in the same application, the survey and plat must so exhibit the boundaries of each as to clearly define them. *Argillite Ornamental Stone Co.*, 29 L. D. 585 (1900).

If after the issue of an order for survey a relocation is made embracing land not included in the original order, a new order must be obtained.

Signature to an application for survey must be in the handwriting of the applicant, his agent or attorney. *Tipton Gold Min. Co.*, 29 L. D. 718 (1900).

A claim legally located may be surveyed according to its lines as marked on the ground even though the surveyed lines may fall upon lands patented prior to the survey. "Such a survey would be regular and lawful as a basis for patent, provided sufficient data be furnished thereby or by the records of the surrounding or overlapping patented claims considered in connection therewith, to enable the government in issuing its patent to make proper exclusion from the patent of all previously patented lands embraced within the exterior lines of the survey."

The department is without jurisdiction after patent to correct mistakes made in the survey and embodied in the description, as long as the patent remains outstanding. *The Mono Fraction Lode Min. Claim*, 31 L. D. 121 (1901).

Advantage cannot be taken of § 2331, Rev. St., providing that "where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required." if the subdivisions included in an entry have been made fractional because of the exclusion therefrom of conflicting patented lode claims. This leaves irregularly shaped tracts, not co-terminous with any legal subdivision, and a survey of them must be made and filed. *Albert B. Knight*, 30 L. D. 227 (1900).

A survey by which record conflicts with prior surveys are made to appear, which conflicts are alleged to have no existence in fact, can be approved by the surveyor general only when it is determined, agreeably to the principle of *Sinnott v. Jewett* (see this case on page 482), what conflicts therewith, if any, must be recognized and the conditions are shown accordingly. *Drogheda & West Monroe Extension Lode Claims*, 33 L. D. 183 (1904).

Where an application for a patent for a placer claim describes a portion of the land as fractional parts of irregular shaped tracts designated as lots by the public survey (e. g. "the S. $\frac{1}{2}$ of lot 3 in sec. 3," etc.), it is

impossible for such description to identify the lands claimed, and a re-survey will be required. *Chicago Placer Min. Claim*, 34 L. D. 9 (1902).

The obligation of the mineral surveyor is to the claimant for whom the services are rendered. These are a matter of private contract which is not enforceable by the land department. The department cannot, therefore, designate another surveyor to make correction of an erroneous survey at the expense of the bondsmen of the defaulting surveyor. The claimant, if injured, may bring suit on the contract, or if that is fruitless, he may sue in the name of the United States to his use on the surveyor's official bond. *Golden Rule Consol. Min. & Mill. Co.*, 37 L. D. 95 (1908).

C. The Application Papers.

p. 357. See Land Office Regulations of March 29, 1909, pars. 39-44, and 60.

(a) The Application.

p. 358.

Colorado.

McConaghy v. Doyle, 32 Colo. 92, 75 Pac. 419 (1903). An application for patent for a placer claim may be amended when the amendment does not embrace any additional territory, but merely reduces the area of the placer tract for which a patent was sought.

LAND OFFICE DECISIONS.

An applicant for patent, who has excluded conflicting ground embraced in a prior application of his own for another claim, may amend his application and entry so as to include ground covered by his senior location, on relinquishment of his claim thereto; but he will be required in such case to make new publication and posting and otherwise comply with the law and regulations. *Victor No. 3 Lode Claim*, 28 L. D. 436 (1899).

A single application may embrace and a single patent issue for placer and lode claims, where the land involved lies in one body or piece and the several claims have a common owner. *Mayflower Gold Min. Co.*, 29 L. D. 7 (1899).

An application for patent for land embraced in an existing mineral entry should not be accepted or entertained.

Proceedings in the form of an adverse claim and suit thereon, instituted by one holding under an existing entry against a subsequent application erroneously entertained, do not constitute a recognition of the validity or regularity of that application, or divest, waive or suspend rights acquired by the entry. *Morgan v. Antlers-Park-Regent Consol. Min. Co.*, 29 L. D. 114 (1899).

Application will not be accepted when the ground applied for is embraced in prior pending applications. *John McConaghy*, 29 L. D. 226 (1899); *Stranger Lode*, 28 L. D. 321 (1899).

An applicant may eliminate by relinquishment or otherwise any part of a claim, not essential to its validity, without prejudicing his claim to the residue. *Carrie S. Gold Min. Co.*, 29 L. D. 287 (1899); *J. Arthur Connell*, 29 L. D. 574 (1900).

The statute does not recognize the right of a person having no interest in or control of a claim to apply for patent therefor. Proceedings for patent instituted by one who had previously conveyed his title to others will be vacated. *South Carolina Lode & Other Claims*, 29 L. D. 602 (1900); *Extra Lode Claim*, 34 L. D. 590 (1906).

Applications including ground embraced in a prior or pending application are rejected by the local office. *Wanda Gold Min. Co. v. E. F. C. Min. & Mill. Co.*, 31 L. D. 140 (1901).

Where the official survey of a claim ties the claim to a post generally believed to be the public survey corner nearest to the claim, a notice of application for patent describing the boundaries of the claim by reference to this post is sufficient although the post be more than two miles from the claim and although some doubt exists as to whether the post be at the true corner of the section as it was supposed to be. *Albemarle & Other Lode Min. Claims*, 30 L. D. 74 (1900).

A notice of application for patent, which gives no connecting line between the claim and a corner of the public survey, and which does not designate the situation of the claim upon the ground with substantial accuracy otherwise, is not sufficient. *Alice Lode Min. Claim*, 30 L. D. 481 (1901).

Land included in a pending application for patent cannot properly be included in a subsequent application of another party. But where, because of failure to show the requisite expenditure, entry was refused as to part of the land included in the first application, such action by the local officers was to the extent of the tract involved, in effect a rejection of the application, and that tract could then be included in a subsequent application. The rights of the first applicant therein were then merely possessory, and if he wished to assert them he should have filed an adverse claim against the subsequent application. *Stemmons v. Hess*, 32 L. D. 220 (1903).

Application for patent may be filed only by the person, association or corporation who has claimed and located the land and complied with the terms of the statute, or by the grantee or grantees of the locator or locators. Where an application for patent is made by an association of persons, one of whom has no interest in the claim, the proceeding is without statutory authority and is void. Where an association applies for patent to a group of claims, each member of the association must have an interest in each claim. *Golden Crown Lode*, 32 L. D. 217 (1903).

An application for patent must, under Rev. St. 2325, be filed "in the proper land office." This means the office of the land district in which the land is situated. The officers of a land district have no jurisdiction or control over lands outside the limits of their districts. Proceedings for

patent to a claim lying partly in one district and partly in another, conducted wholly in one district, and allowance of entry thereon covering the entire claim, are not effective as to the land outside of that district. They do not constitute substantial compliance with the law and do not call for equitable consideration under Rev. St. 2450-2457. *Alaska Placer Claim*, 34 L. D. 40 (1905).

When an application for patent has been rejected, if it is not in itself or for any intrinsic reason fatally defective, it may be made the instrument of renewed proceedings. It is not, however, in the interval a pending application, and can be considered as renewed and as again taking effect only as of the date at which proceedings under it are actively resumed. *Jaw Bone Lode v. Damon Placer*, 34 L. D. 72 (1905).

One application may embrace several claims held in common only when such claims are contiguous; claims which merely have a common corner are not contiguous. *Hidden Treasure Consol. Quartz Mine*, 35 L. D. 485 (1907).

One of several cotenants filed an application for patent without joining the other cotenants, but subsequently acquired the interests of his other cotenants. No adverse claim having been filed, so that the question presented on the record was solely between the applicant and the government, there is no reason for withholding approval of the entry.

"While section 2325, Revised Statutes, does not expressly require a showing of complete title at the time of filing application for patent, it is evident that in contemplation of law only those who assert the full possessory right for themselves, or for themselves and their cotenants, can avail themselves of the authority given by this section. Not every case, however, is perfectly presented, and where a defect is curable and is seasonably cured without detriment to the rights of other parties, this section should not be construed so as to defeat a claim entitled to equitable consideration." *Lackawanna Placer Claim*, 36 L. D. 36, overruled. *E. J. Ritter*, 37 L. D. 715 (1909).

(b) *Proofs Which Must Accompany the Application.*

p. 361. It is no longer necessary to furnish proof of the performance of annual work, or nonabandonment. The present regulations, which take the place of those cited in vol. 1, will be found in the appendix.

LAND OFFICE DECISIONS.

"The general allegation in the protest, that notices of location were not posted on the several locations embraced in the claim, is without corroboration in the affidavits filed in support thereof. Such notices, presumably required by the local laws or regulations, are among the initial steps in the location of a mining claim, and are at most for a temporary purpose

only. While there is no showing on this point in the applicant's proof, still it is not shown by protestants to be a matter of material importance in this case. In the absence of such latter showing it must be presumed that the local laws and regulations have been complied with." *Hughes v. Ochsner*, 26 L. D. 540 (1898).

Where the applicant is a corporation it must, under Rev. St. 2321, file a certified copy of its charter or certificate of incorporation. This must be certified by the officer who has custody of the original or control of the records where it is recorded and must be under the seal of his office. A certificate of a notary public that he has compared the copy with the original is not sufficient.

Where an Illinois corporation applies for a claim in California, it is not necessary to produce evidence that the articles of incorporation have been filed in the office of the secretary of state of California. *Clark's Pocket Quartz Mine*, 27 L. D. 351 (1898).

The intention to become a citizen must be a bona fide existing one at the time of purchase in order to entitle the applicant to a patent. The question of abandonment of that intention was raised but not decided for want of sufficient evidence. *Saturday Lode Claims*, 29 L. D. 627 (1900).

The applicant must have and show full possessory right or title at the date of his application. If he does not, he cannot cure this defect by the subsequent acquisition of the outstanding title. *Lackawanna Placer Claim*, 36 L. D. 36 (1907), overruling *John C. Teller*, 26 L. D. 484, and *Samuel H. Auerbach*, 29 L. D. 208.

(c) *Posting and Publication.*

p. 363. The contents of the notice are prescribed by Land Office Regulations of March 29, 1909, pars. 39 and 46.

United States.

Golden Reward Min. Co. v. Burton Min. Co., 79 Fed. 868 (1897). C. C. D. S. D. When the notice of the application has been posted and published as the law requires, another claimant will not be permitted to say that he did not have notice. Where there is no evidence that anything was done to prevent his receiving this notice, he has had the notice required by law.

Montana.

Helbert v. Tatem, 34 Mont. 3, 85 Pac. 733 (1906). There is no presumption that the first publication of notice of application for patent of a mining claim occurs upon the same date that the application is filed; and a complaint in an adverse suit need not state when the first publication was made if it otherwise appears that the adverse claim was filed in time.

LAND OFFICE DECISIONS.

On action of land office where publication has been omitted by mistake, see *Reed v. Bouron*, 26 L. D. 66 (1899), under chap. XV, div. V.

In selecting a newspaper for publication, a reasonable discretion may be exercised by the register in determining what is a newspaper and which of several newspapers is the one published nearest to the claim. No. 52 of the Regulations of Dec. 15, 1897, omits the words "geographically measured" which were contained in the former regulations. *Instructions*, 26 L. D. 145 (1898).

Republication will not be ordered on the ground that the notice did not refer to adjoining claims, where the claim is correctly described and the protesting parties claim under locations made after the expiration of the period of publication. *Mitchell v. Brovo*, 27 L. D. 40 (1898).

The failure of the applicant to mention in his posted and published notice the names of adjoining claims is a fatal defect and in such case reposting and publication will be ordered. *Gowdy v. Connell*, 27 L. D. 56 (1898).

It is the intent of the statute that the notice should contain such matter as will inform a man of ordinary intelligence and prudence, having an interest in a location conflicting with the one applied for, that application is made for patent to the ground in conflict, thereby giving him an opportunity to file and prosecute an adverse claim. Such a notice is sufficient whether it conforms to every requirement of the official regulations or not. Those regulations are a guide to applicants and local officials and are generally matters of detail, directory rather than mandatory. "The notice must be taken as a whole. If when so taken, it is misleading, then it fails in the purpose of a notice; but if taken as a whole, it points out the ground applied for, it is sufficient."

An error in the course of a connection with a corner of a public survey, which is palpable and will mislead no one, does not vitiate the notice. *Hallett & Hamburg Lodes*, 27 L. D. 104 (1898).

Where published notice contains more ground than is claimed, the sufficiency of the notice is unaffected. As to the ground not included in the application, the notice is surplusage.

It seems that parties interested are affected with notice of everything properly on the record. *Shields v. Simington*, 27 L. D. 369 (1898).

Notice of application was published in a weekly paper for nine consecutive weeks beginning January 16 and ending March 20. Adverse filed March 19 was too late. Paragraph 50 of Regulations of Dec. 15, 1897, provided that, if publication is made in a weekly newspaper, ten consecutive insertions are necessary. "This regulation is inconsistent with law and therefore cannot control. The statute provides that notice shall be 'published for the period of sixty days' and the Department is not authorized to require publication for a longer time. When the notice has been inserted in nine successive issues of a weekly newspaper and the

full statutory period of sixty days has elapsed the publication is complete." *Davidson v. Eliza Gold Min. Co.*, 28 L. D. 224 (1899).

Publications of notice made or begun prior to June 1, 1897, are to be treated in accordance with the practice of the department existing prior to the original decision in *Gowdy v. Kismet Gold Min. Co.*, 24 L. D. 191. *Dimond v. Kahn*, 28 L. D. 229 (1899).

It is not necessary that notice of application for patent should contain a citation to adverse claimants or a notice of the time within which adverse claims must be filed. *Davidson v. Eliza Gold Min. Co.*, 28 L. D. 550 (1899).

Under rule in *Gowdy v. Kismet Gold Min. Co.*, 24 L. D. 191, the failure to include in the published notice the names of adjoining claims will not render such notice insufficient, where publication is begun prior to June 1, 1897, and is substantially in accordance with the practice theretofore existing. *Gowdy v. Connell*, 27 L. D. 56, reversed. *Gowdy v. Connell*, 28 L. D. 240 (1899).

Clerical errors not calculated to mislead or deceive, and not shown or alleged to have misled or deceived any one, do not affect the validity of a posted and published notice. *Opie v. Auburn Gold Min. & Mill. Co.*, 29 L. D. 230 (1899).

In the notice of application for patent it is not necessary to give the names of all adjoining and conflicting claims, but only of such as are shown in the plat of survey. It is not necessary to name an unsurveyed conflicting claim. *Lizzie Ellison*, 29 L. D. 250 (1899).

All three of the notices required to be posted and published are essential. If any one is insufficient, all are rendered valueless. A posted notice which becomes obliterated during the period of posting is insufficient. *Gross v. Hughes*, 29 L. D. 467 (1900).

An error in the published notice is not sufficient to require new notice when it is apparent on the face of the notice, is not of character to mislead, and the several forms of notice, as published and posted, when taken together, show with accuracy the location and boundaries of the land claimed. *Suburban Gold Min. & Land Co. v. Gibberd*, 29 L. D. 558 (1900).

Published notice of application for patent which shows no connection of the claim with a mineral monument, or corner of the public survey, is fatally defective. *Henry Wax*, 29 L. D. 592 (1900).

The rules of the department do not require the notice of application, as posted and published, to contain a description of the lode line. Reference is made in the notice to the official plat on which is indicated the general course or direction of the vein. *Berk v. Nickerson*, 29 L. D. 662 (1900).

The discretionary power lodged in the register by Rev. St. 2325, to designate the newspaper in which notice of application for patent shall be published, is subject to review by the commissioner and the secretary, and where it is found that there has been an abuse of such power, a new publication will be ordered. *Tough Nut & Other Lode Claims*, 32 L. D. 359 (1903).

The published notice of application for patent for a lode claim and mill site described the lode claim but not the mill site, as to which it simply

stated that it was contiguous to the lode claim. It was held that in respect to the mill site there had been no published notice such as the statute required and the entry, to the extent that it embraced land covered by the mill site claim, was canceled. *Reed v. Bowron*, 32 L. D. 383 (1904).

"By the newspaper published nearest a mining claim, within the contemplation of the statute, is meant, as the department regards it, the nearest in point of practicable accessibility; that is, the nearest by the distance from the claim involved over the most nearly direct traversable route, and over which the editions of the paper are or may be transported by the usual and available means of conveyance." "The purpose of the statute demands its practical application, and the distance in contemplation is that which must actually be travelled to bring the paper into the neighborhood of the claim, in order that the intended office of the notice may in that vicinity be performed." *Pike's Peak & Other Lodes*, 34 L. D. 281 (1905).

Rev. St. 2325 requires that an applicant for patent shall have posted on the land a copy of the plat of the claim as well as a copy of the notice of application, and shall file an affidavit of at least two persons that such notice has been posted. This affidavit must cover the posting of the plat as well as of the notice. The requirement as to the filing of this affidavit is mandatory. The department cannot grant relief against it. *Mojave Min. & Mill. Co. v. Karma Min. Co.*, 34 L. D. 583 (1906).

It is not necessary that the notice of application by a corporation shall give the state or territory under the laws of which the corporation was organized. *Holman v. Central Montana Mines Co.*, 34 L. D. 568 (1906).

The notice and plat must be posted in poster or placard form and so attached to something that they can, in the position in which they are placed or without being removed, be conveniently read by the public. It is not sufficient to fold the papers and place them in an oilcloth envelope marked "patent notice". *Tom Moore Consol. Min. Co. v. Nesmith*, 36 L. D. 199 (1907).

D. Entry.

p. 368. The present land office regulations, which take the place of those cited in vol. 1, will be found in the appendix.

The failure of an applicant to make entry within a reasonable time after the expiration of the period of publication, or the termination of adverse proceedings, constitutes a waiver of all rights obtained by the application. Such laches deprives the applicant of the right to make entry, and the entry, if made, will be canceled. Where no adverse claim has been filed, entry should be made before the end of the calendar year in which the period of publication terminates. Otherwise, the applicant's delay is fatal to his right, in the presence of an alleged relocation

of the claim after the end of the year. Indeed, under Copper Bullion and Morning Star Lode M. Claims, *infra*, it would seem that it is not safe in any case to delay making entry beyond the end of the year.

Entry cannot be made pending adverse proceedings, which are a stay of proceedings in the land office. But the suit must be one arising under the mining law whereby the applicant is prevented from completing his patent proceedings prior to the termination of the suit. The suit must have for its end the decision of a controverted question of the right of possession. If it is in the power of the applicant at any time to compel action favorable to himself, he must do so. And his delay in compelling action is laches, from the consequences of which the pendency of the suit will not relieve him.

California.

Cranes Gulch Min. Co. v. Sherrer, 134 Cal. 350, 66 Pac. 487, 86 Am. St. Rep. 279 (1901). "Upon payment of the price and its acceptance, the applicant becomes vested with a complete equitable title and entitled to a patent, which will convey to him the legal title. He is the real owner of the mine. His right is complete; only the evidence of his right is withheld," and legislation changing the character of land which may be located, if applied to land paid for before the legislation enacted, but for which a patent has not yet been issued, would impair a right or interest in mining property.

Montana.

Murray v. Polglase, 17 Mont. 455, 43 Pac. 505 (1896). Where plaintiff in an action on an adverse claim offers in evidence a receiver's receipt for entry of the ground in controversy, the defendant may give in evidence the decision of the land department canceling this entry for fraud in obtaining it.

Murray v. Polglase, 23 Mont. 401, 59 Pac. 439 (1899). When an entryman of a mining claim has complied with the law in good faith, and has been recognized by the government as a purchaser, he is regarded, as to third persons and the government, as the equitable owner of the land. Even if the patent is delayed for any reason, still when it is finally issued it is evidence of the regularity of all previous acts, and relates back to the date of the original entry so as to cut off intervening rights.

New Mexico.

Deeney v. Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724 (1902). A receiver's receipt issued to an applicant during the pendency in court

of an action on an adverse claim, under Rev. St. 2326, is issued without jurisdiction and is void.

LAND OFFICE DECISIONS.

A claim included in an application, and in the notice thereof, but not embraced in the entry because of a defect in the chain of title, may be afterwards included in the entry by way of amendment, if the defect in the title has been cured. *Carrie S. Gold Min. Co.*, 29 L. D. 287 (1899).

An application by A. excluded certain ground. B. filed an adverse claim and began suit. B. then filed an application for the excluded ground. Held, the pendency of the adverse proceeding did not justify the suspension of the entry on the latter application. *Burnside v. O'Connor*, 29 L. D. 301 (1899).

Application for patent for Addenda claim was filed Nov. 11, 1879; adverse claim was filed and judgment thereon rendered April 13, 1882; the applicant made entry on December 10, 1894. A protest was then filed by C., who claimed title under relocation made in 1887 based on failure to do work, and had brought suit against the applicant to quiet title, in which he was successful.

"It is true the proceedings leading up to the decree of the court and the decree itself do not conform to sections 2325 and 2326 of the Rev. Stats. These sections require that such proceedings be initiated in the local land office during the period of publication of notice of the application for patent, but this was not possible in this instance because the mining locations under which protestants claim were not made until long after the publication of notice of the Addenda application was completed. These sections do not provide for a case like the present where the applicant for patent allows his application to lie dormant without payment for the land for several years after publication of notice. Where this is done valid adverse rights to the land, giving to others the lawful right of possession, may attach by reason of a relocation by another based upon the failure of the applicant to make the necessary annual expenditure or his abandonment of the claim; and where rights under such a relocation have been established in judicial proceedings the land department cannot ignore or disregard the court's decision."

As to the difficulty presented by the existing entry, "The mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication or after the termination of proceedings on adverse claims, if any are filed." A failure to do so will be treated as a waiver of the rights obtained by the earlier proceedings upon the application, and the entry will be canceled.

The question of what further effect should be given to the decree of the court in the suit above referred to must be determined on adverse claim to any further application that may be made for the ground. *Cain v. Addenda Min. Co.*, 29 L. D. 62 (1899), reversing 24 L. D. 18.

Same ruling applied where interval of 7 years intervened between expiration of publication and entry. *Scotia Min. Co.*, 29 L. D. 308 (1899); *Barklage v. Russell*, 29 L. D. 401 (1900).

Delay in perfecting a right to a mineral patent under a judgment obtained in opposition to the application of another, as well as delay in perfecting such right under one's own application, may amount to laches such as will entail a loss of the rights acquired by the prior proceedings. *Reins v. Montana Copper Co.*, 29 L. D. 461 (1900).

The failure of an applicant to prosecute his application to completion within a reasonable time after the expiration of the period of publication or the termination of adverse proceedings constitutes a waiver of all rights obtained by the application. Where nearly two years elapsed before entry, it was canceled. There may have been a legal relocation in the meantime. "The assumption declared in sec. 2325 of the Rev. Stats., that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It had nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication." *P. Wolcberg*, 29 L. D. 302 (1899); *Id.*, 29 L. D. 488 (1900).

What is lost by laches in the prosecution of application to entry within a reasonable time is the right to the presumption declared by Rev. St. 2325, that no adverse claim exists and that the applicant is entitled to patent upon payment for the land. The right to the claim is not lost thereby. *Coleman v. McKenzie*, 29 L. D. 359 (1899).

The mining laws contemplate that proceedings under an application for patent shall be completed within a reasonable period after the required publication, or after the termination of proceedings on adverse claims, if any are filed, and failure so to do constitutes a waiver of rights secured under the application. In this case notice was published in 1879, adverse claims were filed, and the last of these was finally settled in 1886. Entry made in 1899 was canceled, without prejudice to commence patent proceedings anew. *Homestake Min. Co.*, 29 L. D. 689 (1900).

The failure of an applicant for patent to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts or of protests in the land department, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application; but where, during the period of publication, an adverse suit is commenced, before its termination a protest filed, and before the dismissal of the latter another protest filed, the applicant, prevented by law during the pendency of the action and by departmental practice during the pendency of the protests from doing more than completing the

publication of notice and filing proof thereof, cannot be held to have waived the rights obtained by the giving of notice simply because a number of years may intervene between it and the payment for the land. *Marburg Lode Min. Claim*, 30 L. D. 202 (1900).

Where claimants apply for patent to only part of a lode mining claim, under Rev. St. 2325, and adverse a prior application to the rest of it, under Rev. St. 2326, the failure to proceed for two years to take the steps subsequent to the advertising of notice of the application is laches, not excused by the pendency of the adverse action, and constitutes a waiver of the rights obtained by the application. *Little Annie No. 5 Lode Min. Claim*, 30 L. D. 488 (1901).

The period of publication having expired April 24, 1900, applicant failed to make entry until Jan. 3, 1901. In the presence of a protest alleging relocation for failure to perform annual work, it was held that applicant was guilty of laches in proceeding with his application and the entry was canceled. The protestant's claim, having arisen subsequent to publication, could not have been asserted as an adverse claim. *Cleveland v. Eureka No. 1 Gold Min. & Mill. Co.*, 31 L. D. 69 (1901).

"The decision of your office evinces a misconception of the decision in the Cleveland-Eureka case. In the earlier cases of *Cain v. Addenda Min. Co.* (29 L. D. 62), *P. Wolenberg* (Id., 302), same case on review (Id., 488), *Scotia Min. Co.* (Id., 308), *Barklage v. Russell* (Id., 401), *Reins v. Montana Copper Co.* (Id., 461), *Homestake Min. Co.* (Id., 689), *The Marburg Lode Min. Claim* (30 L. D. 202), and *Little Annie No. Five Lode Min. Claim* (Id., 488), the Department applied the criterion of a 'reasonable period' to the completion of proceedings under applications for mineral patent, the necessity not having been apparent in any of the cases for a more definite statement on the subject; but in the Cleveland-Eureka case the principle underlying the former rulings was clearly expressed and applied. It is, that where an applicant for patent to a mining claim, after the expiration of the period of publication of notice of the application, voluntarily defers making entry until after the close of the calendar year in which the period of publication ends, his negligence, in the presence of an alleged relocation of the claim after the termination of that year, is fatal to the entry. This principle was again applied by the Department in the recent case of *Surprise Fraction and Other Lode Claims* (32 L. D. 93, 94).

"The reason of the principle is plain and logical. By section 2324 of the Revised Statutes, it is provided that upon each claim located subsequent to May 10, 1872, not less than \$100 shall annually be expended in labor or improvements until patent issues, upon default of which the claim becomes subject and liable to relocation. By section 2 of the act of January 22, 1880 (21 Stat. 61), these annual periods are made to conform to the calendar years. The annual expenditures (which may be made at any time during the year) serve to preserve and protect the possessory title of the locator, who is only relieved from the possible consequences of default in this respect by making entry for his claim, under proper patent proceedings, and thereby acquiring the equitable title and the complete right to patent.

If, then, a claimant who has satisfied the requirements of section 2325, Revised Statutes, applies for patent and carries his patent proceedings to completion by making entry during the calendar year in which the period of publication of notice of the application for patent ends, he acquires the equitable title and thereby obviates the necessity for observing for that year and prospectively the requirement with respect to annual expenditures. If, however, he fails to make entry within the calendar year in which such period of publication ends, his title or interest remains throughout that year purely possessory in character, and—except where entry is prevented by suit in court based upon an adverse claim filed during the period of publication or by pending protest or protests in the land department (The Marburg Lode Mining Claim, *supra*)—dependent for its maintenance and continuance to the succeeding calendar year upon the prescribed annual expenditures, with equal liability to forfeiture by relocation, as though no patent proceedings had been instituted. The length of the interval of time between the end of the period of publication, or the finality of pending adverse proceedings in court or protest proceedings in the land department, and the date of entry, is immaterial, so long as entry is made before the close of the then current calendar year; and the principle with respect to the completion of the patent proceedings is the same whether the time remaining to the applicant within which to make entry as aforesaid be only a day or several months. In the event of default in this respect and an alleged subsequent relocation of the claim, the applicant must be remitted to his original situation, in order that opportunity may be afforded, upon the institution of new patent proceedings, for the determination, by 'a court of competent jurisdiction,' of the newly asserted adverse right of possession." *Lucky Find Placer Claim*, 32 L. D. 200 (1903).

The principle of the ruling in *Marburg Lode Mining Claim, supra*, "rests upon the ground that by reason of the pendency of adverse or protest proceedings it has been rendered impossible, under the law and official regulations, for the applicant to complete his patent proceedings by making payment and entry for his claim, even if it were attempted. But the barrier interposed to his entry must be such as the applicant cannot himself remove, or of right cause to be removed. The pending suit in court must be such as the statute contemplates brought 'to determine the question of the right of possession' and maintaining that character up to the time of its final determination, and not a dead suit, subsisting solely as a matter of record, and within the power of the defendant applicant to cause to be dismissed. It must be a suit which, during its pendency, has for its end the decision of a controverted question of the right of possession as between the parties thereto, and in view of which the statute requires a stay of proceedings in the land department until the question shall have been settled or decided by the court or the adverse claim waived. The applicant must rely upon his legal rights, and may not rely upon the negligence or default of his adversary when it is in his power to compel action favorable to himself. If he pursues the latter course, he is not within and may not invoke the principle of the *Marburg* case." Where the adverse

suit was compromised almost immediately after its institution, and by the terms of the compromise the plaintiffs were to dismiss the cause, and this was not done, nor was any effort made to cause it to be done for two years and a half, the suit cannot be relied upon by the applicant to relieve it from the consequences of its delay in proceeding in the land office. *Ring v. Montana Loan & Realty Co.*, 33 L. D. 132 (1904).

"The only judicial proceedings in which a claim may become involved resulting in delay which would otherwise be fatal to entry, under the doctrine of *Cain v. Addenda Min. Co.* (29 L. D. 62) and like cases, which are held to protect the rights of the applicant for patent during their pendency, are those arising under the mining laws themselves, whereby the applicant is prevented from completing his patent proceedings prior to final determination of the litigation." *Laughing Water Placer*, 34 L. D. 56 (1905).

When an applicant delays more than two years after the expiration of the period of publication before making entry, he will be held to have waived all rights under his application and the entry will be canceled. Affidavits filed by him showing that he has in the meantime performed the requisite annual work will not be considered. That is a matter committed to the courts for decision, and the department can make no adjudication in regard thereto. *Copper Bullion & Morning Star Lode Min. Claims*, 35 L. D. 27 (1906).

An entry based upon an essentially defective notice is unauthorized and must be canceled. It cannot be cured by reposting and republication. The applicant must make a new entry. *Juno & Other Lode Claims*, 37 L. D. 365 (1908).

E. Affidavits and Proofs.

p. 370.

LAND OFFICE DECISIONS.

Affidavits should be taken before officers who are disinterested. The mere fact that the notary is an officer of the corporation which is the applicant will not disqualify him from taking an affidavit to the proof of posting of notice, unless it be also shown that he is a stockholder or otherwise beneficially interested. *Milford Metal Mines Inv. Co.*, 35 L. D. 174 (1906).

There is no authority of law for an agent to make oath to an application for patent except in the cases provided for in the act of January 22, 1880, amending Rev. St. 2325. Where, therefore, the oath is made by an agent when his principal is a resident of and is within the land district where the claim applied for is situated, his application is invalid for any purpose, and the invalidity cannot be cured by filing a new application properly verified. Proceedings must be begun anew. *Crosby & Other Lode Claims*, 35 L. D. 434 (1907).

The provision of Rev. St. 2325, that the application for patent be "under oath," and the provision of Rev. St. 2335, that affidavits be "verified before an officer authorized to administer oaths within the land district where

the claims may be situated," are mandatory. Their observance is essential to the jurisdiction of the local officers to entertain the proceedings. *North Clyde Quartz Min. Claim & Mill Site*, 35 L. D. 455 (1907).

The requirement of Rev. St. 2325 that the posting of notice shall be shown by an affidavit of at least two persons, and the provisions of Rev. St. 2335 as to the officer before whom the affidavits shall be made, are mandatory. A defect in the proceedings arising from the fact that such affidavit was made outside the land district in which the claim was situated cannot be cured by the subsequent filing of a properly verified affidavit. *El Paso Brick Co.*, 37 L. D. 155 (1908).

F. Action by the Land Office and Issue of Patent.

p. 371. The present Land Office Regulations, which take the place of those cited in vol. 1, will be found in the appendix.

The determination by the department of any question of which it has jurisdiction is conclusive and cannot be collaterally attacked.

Transfers made after the filing of the application for patent will not be considered by the department, and patent will issue in the name of the applicant. (L. O. Regs. of March 29, 1909, par. 71.)

Until patent has actually issued, the entry is under the control of the department, which may inquire and determine whether it was properly allowed, and may, if the allowance is determined to have been improper, cancel it; but when the patent has issued it is then beyond the control of the department.

United States.

Griffin v. American Gold Min. Co., 52 C. C. A. 507, 114 Fed. 887 (1902). 9th Circ. When an application is made for a patent for a lode claim, and a prior placer patentee protests on the ground that the lode claim includes a part of the ground of the placer claim, and that the existence of a lode therein was unknown when the placer patent was applied for, the decision of the land department in favor of the protestant, and holding the lode claimant's entry for cancellation to the extent of the conflict, is conclusive upon the courts.

Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S. 220, 48 Law. Ed. 944 (1904), affirming 29 Colo. 377, 68 Pac. 286, 93 Am. St. Rep. 89, 64 L. R. A. 209. The action of the department in rejecting an application for patent does not avoid the location or affect the possessory rights to the claim. "Undoubtedly when the department rejected the application for a patent, it could have gone further and set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the

public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have." (See *Clipper Min. Co. v. Elh Min. & Land Co.*, 33 L. D. 660.)

California.

Southern Cross Gold Min. Co. of Kentucky v. Sexton, 147 Cal. 758, 82 Pac. 423 (1905). The secretary of the interior is without power to cancel an entry and cut out the rights of the original entryman on the ground of an error in publication made by a government official, where the entryman was without fault.

Colorado.

German Ins. Co. v. Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206 (1895). The land department, after entry and issuance of receipt, may cancel the same on the ground that the land is not mineral.

A protest on this ground is within the exception to Rev. St. 2325 "that the applicant has failed to comply with the terms of this chapter." A protestant on this ground, who has not adversed, has a right of appeal.

Rebecca Gold Min. Co. v. Bryant, 31 Colo. 119, 71 Pac. 1110, 102 Am. St. Rep. 17 (1903). Where the locators of a claim include a piece of land within their claim and describe it in their location certificate, but in pursuance of an agreement with other persons expressly exclude it from their application and receive a patent also excluding it, and the persons with whom they had agreed subsequently apply for a patent for this piece of land, receive a receiver's receipt therefor, and go into possession thereof, the commissioner of the land office has no right to exclude it from the final certificate of entry without notice to, or knowledge of, the applicant, on the ground that in one of the papers filed in the department the applicant had not included the land in question, and a location of this piece made by third parties after the receiver's receipt was issued is void.

Gurney v. Brown, 32 Colo. 472, 77 Pac. 357 (1904), affirmed *Brown v. Gurney*, 201 U. S. 184, 50 Law. Ed. 717 (1906). The judgment of the land department respecting those matters which it must determine in ascertaining whether or not an applicant is entitled to acquire the title from the United States is collaterally unassailable.

The mere suspension by the department of a mineral entry for the purpose of requiring compliance with departmental regulations does not destroy the force of the certificate of entry, or enable third parties to attack its validity.

Peoria & Colorado Mill. & Min. Co. v. Turner, 20 Colo. App. 474, 79 Pac. 915 (1905). The cancellation of a mineral application and entry for patent does not of itself operate to restore the land to the public domain and render it subject to relocation. It does not divest the claimant's title. It simply checks or terminates the patent proceedings. It does not evidence either a forfeiture or relinquishment of the location or claim by the applicant.

Mineral Farm Min. Co. v. Barrick, 33 Colo. 410, 80 Pac. 1055 (1905). The decision of the proper officers of the interior department in matters within its jurisdiction upon questions of fact is conclusive upon the courts in the absence of fraud, perjury, or some such vice. Even if no adverse claim or protest was filed at the time of the final entry, the commissioner has jurisdiction, upon due notice, of his own motion, to cancel the entry for a failure by the claimant to comply with some statute or rule of the department.

Montana.

Silver Bow Min. & Mill Co. v. Clark, 5 Mont. 378, 5 Pac. 570 (1885). See this case under chap. XVI, div. I.

Wyoming.

Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36 (1906). If pending application for patent the locator transfers his title, the proceedings are not terminated, but he becomes a trustee for his grantee in whom the title vests upon the issuance of the patent.

LAND OFFICE DECISIONS.

A reservation of the right of way of a railroad will not be inserted in the final certificate where it appears that there has been a breach of condition by the railroad but no reassertion of ownership by the government. The rights of the railroad are protected without such a reservation. *Mary G. Arnett*, 20 L. D. 131 (1895).

After patent has issued the land department has no power to correct an erroneous survey. The only means of doing so is to surrender the patent and make a new application or to make application for the omitted land. *Eureka & Excelsior Consol. Gold Min. Co.*, 24 L. D. 512 (1897); *Mono Fraction Lode Min. Claim*, 31 L. D. 121 (1901).

If, after entry, the applicant finds it necessary to protect his claim by adverse suit against a conflicting claim, it is incumbent on the government to take notice of the result and act accordingly. *S. H. Standart*, 25 L. D. 262 (1896).

An application for patent for land embraced in a prior pending application should not be allowed. If a local office receives such application, those objecting should appeal to the general land office where the application will be held for cancellation. In this case protestants were adverse claimants to the prior application and they were not required to adverse the second application also. *Aspen Mountain Tunnel Lode No. 1*, 26 L. D. 81 (1898); *Stranger Lode*, 29 L. D. 321 (1899).

An applicant who expressly excludes from his notice stated areas is not entitled thereafter to make entry of such excluded ground without giving notice of such intention. *Woods v. Holden*, 26 L. D. 198 (1898), affirmed 27 L. D. 375, 28 L. D. 24 (1899).

Stay of proceedings may be ordered pending judicial proceedings that may affect title, though based on a protest which does not require an adverse suit under the statute. *Thomas v. Elling*, 26 L. D. 220 (1898).

A case is in the control of the department up to issue of patent. It is not taken out of that control by a decision that patent should issue. That decision may be recalled or overruled at any time before patent issues. When patent issues, it is beyond the control of the department. *Aspen Consol. Min. Co. v. Williams*, 27 L. D. 1 (1898).

An entry irregularly allowed during the pendency of a suit on adverse claim will not be canceled, where subsequently such suit is dismissed, leaving the applicant in the same status as if no adverse claim had been filed. *Mutual Min. & Mill. Co. v. Currency Co.*, 27 L. D. 191 (1898).

"An applicant for patent who excludes or omits from his application ground the right to the possession of which has been regularly and judicially determined in his favor, and for which he can obtain patent without embracing it in such application, does not by such exclusion or omission invalidate or waive any claim or right which he would otherwise have." *Woods v. Holden*, 27 L. D. 375 (1898).

Application was made for patent for H. & R. and the applicant filed a relinquishment of all ground in conflict with the Ruby. Owner of Golden Terry filed an adverse claim and prosecuted the same successfully. Application was then made for patent to Ruby. Owner of Golden Terry filed adverse, began suit but subsequently dismissed the same, relying on the judgment in the former suit as an adjudication in his favor. "Having been filed before any adverse claim was filed, the relinquishment operated to withdraw from the pending application the land relinquished, and this it accomplished as effectually as if that land had never been included in the application." The former judgment therefore did not affect the title to the part in conflict between the Ruby and the Golden Terry. The owners of the latter had no personal notice of the relinquishment and relied on the published notice. Having neglected to examine the record they must suffer the consequences of their negligence. *Shields v. Simington*, 27 L. D. 369 (1898).

Where two claims are embraced in one entry and there is no pending contest, protest or adverse proceeding of any kind against one of these claims, under the circumstances of this case patent may issue therefor, without waiting for the termination of litigation as to the other claim. *Kohnyo & Fortuna Lodes*, 28 L. D. 451 (1899); *Id.*, 28 L. D. 562 (1899).

Where applicant dies after application, but before final proof and payment, patent should be issued in the name of "the heirs of (applicant) deceased." *Tripp v. Dunphy*, 28 L. D. 14 (1899).

A mining claim will not be passed to patent when in the description, both in the surveyor's certificate and in the notice of application, the name of the county in which the claim is situated is incorrect. *Wright v. Stour Consol. Min. Co.*, 29 L. D. 154 (1899); *Id.*, 29 L. D. 289 (1899).

A deed for ground embraced in the entry, placed in escrow, prior to entry passes no title, and it is error to hold the entry for cancellation to

that extent. The deed in this case was made as consideration for the withdrawal of an adverse claim. *Brady's Mortgagee v. Harris*, 29 L. D. 89 (1899).

Where the certificate of entry of a placer claim describes the land in terms of the general public survey and the surveys of excluded lode claims, such description is sufficiently accurate, and the said surveys, taken together, furnish the necessary data for the computation of the area of the land, and for the preparation of an accurate description to be incorporated in the patent. *Albert B. Knight*, 30 L. D. 227, overruled. *Mary Dowling Placer Claim*, 31 L. D. 64 (1901).

Where an adverse is filed to an application for patent to a mining claim, and pending the disposition of the action brought in support of the adverse the adverse claimant applies for, and through the inadvertance of the local officers is allowed entry upon, a claim which includes the subject of conflict in the pending action, the entry will be canceled to the extent of the conflict. *Long John Lode Claim*, 30 L. D. 298 (1900).

There can be no valid entry upon an application for patent until notice of patent shall have been lawfully given. An adjudication by the department that the notice of application is defective is equivalent to a determination that the entry based thereon is void and should be canceled. Such an entry will be treated as though formally canceled as of the date of the adjudication. *Southern Cross Gold Min. Co. v. Sexton*, 31 L. D. 415 (1901).

Until patent has issued, the department has jurisdiction to enquire and determine whether or not a claimant for lands under the public land laws has complied therewith, and, if entry has been made by such claimant, to inquire and determine whether or not said entry was properly allowed, and if found not to have been properly allowed, it is the duty of the department to vacate and cancel the entry. *Reed v. Bowron*, 32 L. D. 383 (1904).

Entry will be allowed and patent will issue in the name of the applicant, notwithstanding he has transferred his claim pending the application. The local records upon which both deed and patent are spread will disclose the title claimed by the transferee, and the title conveyed by the patent will inure by operation of law to his benefit to the extent of such interest as he may have acquired. *Liddia Lode Min. Claim*, 33 L. D. 127 (1904).

A recital of exclusion of conflict in the notice of application for patent as effectually eliminates the conflict area as if the exception and exclusion were in terms declared in the application for patent itself. *Richmond & Other Lode Claims*, 34 L. D. 554 (1906).

G. Hearings as to the Character of Land.

p. 376. See, also, Land Office Regulations of March 29, 1909, in the appendix.

United States.

Northern Pac. R. Co. v. Soderberg, 86 Fed. 49 (1898). C. C. D. Wash. N. D. The decision of the question whether land within the limits of a railroad grant is mineral or nonmineral is to be made by the land department. Where the land has not been surveyed and its character is still undetermined by the department, the court will not decide this question in advance. But at the suit of the railroad company, one who is quarrying stone on such land will be enjoined until the character of the land is determined by the department.

Lynch v. U. S., 71 C. C. A. 59, 138 Fed. 535 (1905). 9th Circ. "It is assigned as error that the court refused to instruct the jury that the government was bound by the classification made by the mineral land commission, and could not be heard to impeach such determination by asserting that the land was not mineral. The Secretary of the Interior construed the act of February 26, 1895, very soon after it was passed, as intended to facilitate the adjustment of the grant of land to the Northern Pacific Railroad Company, by enabling the Secretary of the Interior to ascertain without delay what lands within the limits of the grant to said company in the states of Montana and Idaho were mineral in character, and excepted from the operation of the grant. The Secretary also determined that the classification of land as mineral under the act did not prevent the Land Department from making such disposition of the land as would be proper upon a subsequent showing that the land was not in fact mineral. 25 L. D. 446, 447; 26 L. D. 423, 424. This construction of the statute has been the law of that department upon this subject for nearly eight years, and, as far as we are advised, it has not before been questioned. The contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. *United States v. Johnston*, 124 U. S. 236, 253, 8 Sup. Ct. 443, 31 Law. Ed. 389. We find no reason advanced in the defense to this action for holding that the construction placed upon the statute by the Secretary of the Interior is erroneous."

LAND OFFICE DECISIONS.

The nonmineral character of a tract of land having been determined as the result of a hearing had on that issue, the department is not justified in ordering another hearing on the same issue, in the absence of a clear showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land. *Mackall v. Goodsell*, 24 L. D. 553 (1897).

In a hearing ordered to determine the alleged known mineral character of land embraced in an agricultural entry, made at the conclusion of a prior contest involving the character of the land, the evidence must be confined to discoveries after the date of the first hearing and prior to the allowance of the entry. *Leach v. Potter*, 24 L. D. 573 (1896).

In proceedings arising between a mineral claimant and a state claiming under a school grant, where the character of the land involved is in issue, and the evidence submitted by the parties is unsatisfactory and the secretary of the interior, on his own motion, with due notice to the parties, directs a mineral expert, of his own designation, to examine the land, and thereafter appear before the local office and testify under oath as to the result of such investigation, with full opportunity given for cross-examination, and no objection is made to such direction of the secretary until after its full execution, but acquiescence therein is manifested by the designation of a particular portion of the land for examination, the testimony of such expert, so given, may be properly considered, together with the other evidence in the case.

If the presumptive mineral character of land is based upon exploration of only one portion thereof, the burden assumed by one who alleges the agricultural character of such land is sustained by evidence of exploration on the same portion, sufficient to demonstrate the fact of its nonmineral character, and thereby overcome the effect of the alleged prior exploration and discovery. *State of Washington v. McBride*, 25 L. D. 167 (1897). See *Chormicle v. Hiller*, 26 L. D. 9 (1898), under chap. XVI, div. IV.

The ordering of a hearing is lodged in the sound discretion of the commissioner, and unless there is an abuse of that discretion the department will not interfere. *Reed v. Bouron*, 26 L. D. 66 (1898).

L. having located ground as a mining claim sold his claim to contestants, and subsequently made entry for the same land as agricultural. Held, the department was not relieved of the duty of determining the actual character of the land by L.'s bad faith towards the contestants. "However much his conduct and representations might operate as an estoppel against him in his private affairs, the government cannot be bound thereby. L.'s action in representing the land to be mineral, and in attempting to dispose of it as such, may subject him to liability for deceit but this department has no jurisdiction over such questions." The land was found on the facts to be agricultural. *Reid v. Lavallee*, 26 L. D. 100 (1898).

The fact that a placer claimant has conducted profitable mining operations on a part of his claim does not in itself give him any right as against an adverse homestead claimant for another part of such claim, lying in a different quarter section and that had been previously adjudged non-mineral in a departmental decision. *Montgomery v. Gilbert*, 26 L. D. 216 (1898).

The abstract of *Aspen Consol. Min. Co. v. Williams*, 23 L. D. 34 (see vol. 1, p. 382), is taken from the syllabus of that case but is incorrect. That case is, however, now overruled.

W. made preemption claim to land returned as agricultural; entry and payment were made by him on Feb. 11, 1885. The survey then in force was

suspended Sept. 16, 1886. On March 4, 1891, the mining company protested against the issue of patent and a hearing was ordered as to character of the ground. A subsequent survey was made returning the ground as mineral.

The burden of proving the land to have been known to be mineral at date of entry was on the mining company because (1) "when final proof, including proper showing as to the character of the land, has been regularly submitted to the local officers and approved by them and entry allowed and certificate issued, the character is established by a higher quality of evidence than that offered by the surveyor's return"; (2) W.'s entry was not affected by the survey and return of 1892; (3) the burden having been placed on the company by the order granting the hearing, and no modification thereof having been asked, there should have been no subsequent re-adjustment of that burden.

Evidence of discovery of minerals subsequent to W.'s entry did not affect his title. *Aspen Consol. Min. Co. v. Williams*, 27 L. D. 1 (1898).

A certificate of location of a mining claim on land returned as agricultural is not sufficient evidence that the land is mineral to cast the burden of proving the contrary upon the agricultural claimant. (*Sweeney v. Northern Pac. R. Co.*, 20 L. D. 394; *Northern Pac. R. Co. v. Marshall*, 17 L. D. 345; *Walker v. Southern Pac. R. Co.*, 24 L. D. 172, overruled.) Such a certificate is not evidence of discovery, and is not evidence of the mineral character of the land.

"The return of the surveyor general, in connection with the survey of public land to the effect that the land is mineral or nonmineral, is sufficient evidence of its character to cast the burden of proving the contrary upon one who alleges that the land is of a different character, but the opportunities and qualifications of surveyors for determining the mineral or non-mineral character of land are so uncertain that this presumption is only a slight one and may be readily overcome by evidence of a higher character.

* * * This land having been returned as agricultural, it was necessary for the protestants to show the existence of mineral in sufficient quantities to make the land more valuable for mining than for agricultural purposes; or as was held in the case of *Castle v. Womble* (19 L. D. 455) it was incumbent upon them to show such a mineral discovery as would warrant a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine." *Magruder v. Oregon & C. R. Co.*, 28 L. D. 174 (1899).

A decision of the secretary in proceedings to determine the character of land, that it is principally valuable for its mineral deposits, is, so long as it remains undisturbed, binding upon all the officers of the land department and prevents disposition of the land in any other way than as prescribed by the laws specially authorizing the sale of mineral lands. It was error to give such decision of the department merely the effect of a mineral return and allow homestead claimants to make entry of the land upon the mere filing of a nonmineral affidavit. "To secure a hearing whereby the effect of that decision might be overcome it was necessary for the agri-

cultural applicants to allege that exploration and development subsequent to the former hearing or trial had shown the land to be nonmineral or that the former decision was based upon fraud or mistake such as would justify further inquiry into the character of the land. At such a hearing proof of the abandonment of the mining claim would have been a circumstance tending to show that the mineral claimants deemed the land worthless for mining purposes."

Under the evidence in this case the land was held to be mineral. *Coleman v. McKenzie*, 28 L. D. 348 (1899).

Where land within the limits of a railroad grant is claimed to be mineral, the company is entitled to actual service of notice of the hearing. Notice by posting and advertising is not sufficient. *McCloud v. Central Pac. R. Co.*, 29 L. D. 27 (1899).

Hearing as to the character of land classified under act of Feb. 26, 1895, was ordered where the protest was not filed until after the prescribed time, but the report of the commissioners was false and a clear misrepresentation of the facts. *Lamb v. Northern Pac. R. Co.*, 29 L. D. 102 (1899).

A certificate of the location of a mining claim is not sufficient evidence of the character of the land to shift the burden of proof where the land has been returned as agricultural. *McQuiddy v. California*, 29 L. D. 181 (1899).

Land more valuable on account of the sandstone it contains than for agricultural purposes is mineral and should be so classified under act of Feb. 26, 1895. *Beaudette v. Northern Pac. R. Co.*, 29 L. D. 248 (1899).

By act of Aug. 5, 1892, the railroad company, in consideration of its relinquishment of certain Dakota lands, was permitted to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey which has or shall be made." The character of lands, which have been so classified and selected, will not be investigated on protests, making vague allegations of mineral locations, without giving their dates or alleging locations made after government survey. Par. 104, Land Office Regulations is not applicable to these selections. *Bedal v. St. Paul, etc., Co.*, 29 L. D. 254 (1899).

The classification of land as mineral by the board of commissioners under act of Feb. 26, 1895, and the final approval thereof by the secretary, is in effect a cancellation of a previous selection of the land by the railroad company and thereafter the company or any one claiming under it cannot be heard to question the character of the land, except upon the ground of fraud in the classification. *Luthye v. Northern Pac. R. Co.*, 29 L. D. 675 (1900).

Rev. St. 2325 is a statute of repose only so far as to bar the assertion of adverse claims not filed within the period of publication. It does not relieve the land department from ascertaining the character of the land sought to be patented. "The land department is charged with the duty of disposing of the public lands in the manner provided by law and its officers must determine the character of the land and dispose of it only under the law applicable thereto. That nonmineral land cannot be disposed

of under the mining laws is a cardinal rule in the administration of the public land laws." *Ferrell v. Hoge*, 29 L. D. 12 (1899).

Where a protest is made against the issuing of a homestead certificate for certain land on the ground that the land is more valuable for its mineral deposits than for agricultural purposes, a hearing will not be ordered if the protestants fail to allege that the existence of these mineral deposits was known at the time when the final homestead certificate was issued. Such certificate stands as of the date when notice of final proof was given, even though the first notice thereof erroneously described the land claimed and a subsequent notice describing it correctly had to be filed, in the absence of prejudice shown to any one's right or claim to the land by reason of the error in the first notice. *Dufrene v. Mace's Heirs*, 30 L. D. 216 (1900).

By act of March 2, 1899, in consideration of the release and conveyance of certain lands by the railroad company to the United States, the company was "authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey." "When the field notes and surveyor's return make no notation whatever of minerals in the land being surveyed, such lands are considered and treated as given a nonmineral classification by the surveyor." A coal declaratory statement filed a year after the lieu selection cannot affect that selection, nor can a subsequent protest in which it is stated, not that the land was known to be mineral at the time the selection was presented, but only that it contained valuable mineral deposits at the time of filing the protest. *Davenport v. Northern Pac. R. Co.*, 32 L. D. 28 (1903).

The fact that land was, prior to survey, classified as mineral under the act of February 26, 1895, cannot be considered as a classification as mineral "at the time of actual government survey." "While it is true that the classification by said commissioners when approved was final as to the Northern Pacific Railroad Company, it did not prevent such disposal of the lands as may be proper on a subsequent showing as to their character." When the land in question was subsequently surveyed, it was classified as nonmineral, and consequently might be disposed of as such. *St. Paul, M. & M. R. Co.*, 34 L. D. 211 (1905).

In determining whether land contains coal deposits, the well known rules of evidence are as applicable as in any other case, and whatever is relevant to and bears in any degree upon the question is admissible. Neither discovery nor actual production are necessary conditions in the case of coal lands. The characteristics of such deposits are to be kept in view; and reliance must frequently be had upon such evidence as may become the guide of the geologist or coal expert. *Instructions*, 34 L. D. 194 (1905).

"To sustain the application for mineral patent, as against persons alleging the land to be nonmineral, it must appear that mineral exists in the land in quantity and of value sufficient to subject it to disposal under the mining laws. In other words, the land applied for must be shown to contain valuable deposits of mineral, which means more than a mere discovery,

that might be sufficient to support a location in the first instance." *Brophy v. O'Hare*, 34 L. D. 596 (1906).

By section 7, of the act of March 3, 1891, it is provided that after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert land, or preemption laws, the entryman shall be entitled to a patent, if there is no pending contest or protest against the validity of the entry. This does not preclude proceedings to determine the character of the land subsequent to the expiration of the period of two years, and if upon such proceedings it is shown that the land was at the date of final entry known to be chiefly valuable for minerals, the entry will be canceled. *Herman v. Chase*, 37 L. D. 590 (1909).

II. ADVERSE CLAIM AND ACTION THEREON.

p. 382. When a patent has issued, the title to the land covered thereby is no longer within the control of the land office and the patentee cannot be required to answer the claims of others when made in that office. Patentees, therefore, are under no obligation to protect their claims by filing adverse claims under Rev. St. 2326. This rule, which was laid down in *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 34 Law. Ed. 155 (see vol. 1, p. 392), is now held by the land department to have no exceptions. The patentee of a placer claim not only need no longer file an adverse to an application for a lode claim within his boundaries, even when the lode applicant claims that the lode was known to exist at the time of the placer application, but if such an adverse is filed, the department will not recognize proceedings thereon as in any way binding upon it. The purpose of the adverse claim and the proceedings thereon is to reach a final determination of the right of possession as between rival claimants of mineral land. The only question involved is the right of possession, and the proceeding can only influence land office action in the case of mineral lands. Claimants under laws providing for the disposal of nonmineral lands are not required to file adverse claims in order to protect their rights against applications based on claims that the land involved is mineral. (Cases to the contrary, *Bonner v. Meikle*, 82 Fed. 697; *Young v. Goldsteen*, 97 Fed. 303, can no longer be considered authoritative.) The decision of the department that land is not mineral is binding on the courts and so far as its relation to departmental action is concerned puts an

end to the suit on the adverse claim. Consequently, an adverse claim by a mill site owner, a railroad company, or one claiming under a townsite will not be entertained by the department when the land has already been determined to be mineral.

If adverse rights arise after the expiration of the period of publication and, therefore, could not have been asserted within that period, they are not barred by failure to file adverse claims. A tunnel claimant is not obliged to file adverse claims against applications for ground within fifteen hundred feet of his tunnel, before he has discovered veins which enter the ground applied for.

A locator under the act of 1866 must file an adverse claim to protect his rights against an application based on a location under the act of 1872. A patentee under the act of 1866, under the general rule stated above, of course, is not required to do so. (In the first sentence on page 383, vol. 1, the words "locator" and "patentee" have, by an error, been reversed.)

The requirement of the statute that the claim must be filed within the period of publication is mandatory. It is not within the province of the department to extend this time on any ground. If the last day falls on Sunday, the adverse may not be filed on the following day. (The contrary view formerly held by the land office [vol. 1, p. 383] has been abandoned.)

By act of Congress June 7th, 1910, adverse claims in the district of Alaska may be filed at any time during the sixty-day period of publication, or within eight months thereafter, and adverse suits may be instituted at any time within sixty days after the filing of said claims.

An adverse claim is sufficient as to form, if it complies with the requirements of the statute, even if it does not conform to the requirements of the land office regulations. (See appendix for present land office regulations.)

A court of competent jurisdiction is any court competent to determine the right of possession. This includes all state courts having jurisdiction of questions of title to mining claims. It also includes the federal courts in cases where the usual conditions of federal jurisdiction exist. An action on an adverse claim is not in itself a suit arising under the laws of the United States in such a sense as to confer jurisdiction on the federal courts, regardless of the citizenship of the parties. Such a suit may present a fed-

eral question, but the mere fact that it is authorized or required to be brought by act of congress does not confer jurisdiction on those courts. So, also, the supreme court of the United States will not entertain an appeal from a state court where no other ground of jurisdiction appears than that the suit is one under the provisions of Rev. St. 2326. In order that such an appeal should lie, it must appear that a right was specifically claimed under some law or the constitution of the United States and was denied.

Since the form of the action, the character of the pleadings, and the rules of procedure, are governed by the practice of the jurisdiction in which the suit is brought, these may differ in the several states except so far as those essentials mentioned in volume 1, page 385, are concerned. Thus, in Montana it is necessary to allege and prove that the adverse claim was filed and the suit begun within the periods prescribed by the act of congress; while in California and Colorado it is not necessary to do so. In Alaska it has been held that a third party who has not filed an adverse claim may be permitted to intervene. This right has been denied in California and Montana. An action on an adverse claim may be nonsuited without violating the amendatory act of 1881. It may likewise be dismissed for want of prosecution. What is due diligence in prosecution is a question to be decided by the court and not by the department. A suit brought between the applicant and the adverse claimant before the filing of the adverse claim, although involving the right of possession of the disputed ground is not recognized by the department as a compliance with the statute. In Idaho it has been held that such a suit might stand as a suit on the adverse claim. The decision can, of course, have no controlling effect in the land office. Possession for a period equal to the time prescribed for the running of the statute of limitations, which by Rev. St. 2332 confers a right to a patent in the absence of adverse claims, is not available in an action on an adverse claim, since such possession only confers a right in the absence of such a claim.

The manner in which the court ascertains the fact in issue does not affect the force of its judgment. That judgment is not the less binding because it was entered in pursuance of a stipulation between the parties. It must, however, be limited to the

determination of the right of possession. If it goes further and adjudges that either party is entitled to purchase the ground from the government, it encroaches upon the jurisdiction of the land office, which is not bound thereby. When judgment has been rendered for the adverse claimant, he need not make an original application for patent. He, as "the party entitled to the possession of the claim," can obtain a patent upon the judgment roll by complying with the requirements set out in Rev. St. 2326. But his entry must, it seems, conform to his claim. If his adverse was based upon a placer location, he may not make entry for a lode. An entire failure to prosecute an application to completion within a reasonable time after the termination of the adverse proceedings is treated by the land office as a waiver of the rights acquired by those proceedings.

When an applicant expressly excludes from his application stated areas, it is not necessary for others claiming rights therein to file adverse claims; and in this regard a relinquishment of ground included in the application, if made before the filing of adverse claims, is equivalent to original exclusion. Relinquishment subsequent to the filing of an adverse claim, however, will not be allowed to prejudice the rights of the adverse claimant. The exclusion of ground by the applicant is not a waiver of any claim or right which he may have therein. The statute only applies to claims arising out of independent conflicting locations of the same ground; it has no application to controversies between co-owners claiming under the same location. They, however, when excluded from an application for patent, may protect their rights by protest. (See Land Office Regulations, par. 53, in Appendix.)

On the question of the right of the adverse claimant to set up as against the applicant for patent in an action on the adverse claim the existence of a prior conflicting location which has been abandoned or forfeited, see *Lavagnino v. Uhlig*, 198 U. S. 443, 49 Law. Ed. 1119, and *Farrell v. Lockhart*, 210 U. S. 142, 52 Law. Ed. 994, 16 L. R. A. (N. S.) 162, and the discussion of these cases under chap. XII.

United States.

Bushnell v. Cooke Min. & Smelting Co., 148 U. S. 682, 37 Law. Ed. 610 (1893). When an action on an adverse claim has been brought in a state

court, an appeal will not lie to the supreme court of the United States, where the questions presented and decided involved no construction of any federal statute, nor did it become necessary to determine the rights of the parties under the federal mining statutes.

Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., 167 U. S. 108, 42 Law. Ed. 96 (1897). Where a tunnel claimant discovers a vein in his tunnel and locates a claim thereon, which conflicts with a claim which was located after the location of the tunnel right and patented previously to the discovery of the vein in the tunnel, his rights are not destroyed or impaired by reason of his having failed to file an adverse claim.

"Now at the time the application for patent to the Vestal claim was presented and the proceedings had thereon, the defendant knew of no vein which would enable it to dispute the right of the owners of the Vestal to a patent. The Vestal claim, it will be perceived, runs parallel to the line of the tunnel, and is distant therefrom some five hundred feet. The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located, and such a vein would not, unless it radically changed its course, cross the line of the tunnel. Whether it did or not, or whether any other vein should be found in the tunnel which should cross the territory of the Vestal, was a matter of pure speculation, and there would be no propriety in maintaining a suit to establish defendant's inchoate right and delay the Vestal claimants in securing a patent on a mere possibility which might never ripen into a fact. The obvious contemplation of the law in respect to these adverse proceedings is that there shall be a present, tangible and certain right, and not a mere possibility. Of course, the owners of the Vestal claim had notice, from the fact of the location of the tunnel line, of the possibilities which future excavations of the tunnel might develop, and so they were not prejudiced by the failure to 'adverse.' And as the defendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings and, therefore, nothing lost by a failure so to do."

Bonner v. Meikle, 82 Fed. 697 (1897). C. C. D. Nev. The owner of a lot in an unpatented townsite may file an adverse claim and maintain an action thereon. See this case under chap. XVI, div. I.

Shoshone Min. Co. v. Rutter, 31 C. C. A. 223, 87 Fed. 801 (1898), 9th Circ., affirming *Rutter v. Shoshone Min. Co.*, 75 Fed. 37. A bill in equity is a proper action on an adverse claim. "The proceeding required, authorized and directed by section 2326 of the Rev. Stat. has no specific relation whatever to the action of ejectment, or to any other common-law action. The object of the proceeding is the determination of the contest in the land office, as to which of the parties, if either, is entitled to receive a patent from the government—a right which arises out of a full compliance with the laws of congress for the acquisition of a government patent for mineral lands. The proceedings are purely statutory, and their inception is in the land office, not in the courts where the suit is commenced."

"Whatever may be said of the nature and character of these proceedings when tried in the state courts, where the statutes have, as to the forms of action, abolished the distinction which exists in the national courts between law and equity, it must, we think, be conceded that such proceedings are of an equitable nature, and, when brought in the national courts, are to be tried as equity cases. The mere fact that in certain cases an action at law has been deemed sufficient does not change the equitable character of the suit. The suit is brought for special relief, and the judgment required to be entered is such as a court exercising jurisdiction in equity alone could render."

"The determination of the rights of the parties, as required by section 2326, as we have already said, is not necessarily the subject of a common-law action; and a trial thereof on the equity side of the court is certainly not a violation of the provisions of the constitution, which declares that the right of trial by jury shall be secured to all and remain inviolate forever. The equity jurisdiction of the United States courts is not controlled by state legislation." (Reversed on question of federal jurisdiction in 177 U.S. 505, 44 Law. Ed. 864, below.)

St. Louis Min. & M. Co. v. Montana Min. Co., 171 U. S. 650, 43 Law. Ed. 320 (1898), affirming *Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 20 Mont. 394, 51 Pac. 824. The parties to an action on an adverse claim may compromise and settle it. Such a settlement is not against any public policy of the government.

Erwin v. Percgo, 35 C. C. A. 482, 93 Fed. 608 (1899), 8th Circ., affirming 85 Fed. 904. In an action on an adverse claim, the cause of action is one arising in the county where the land is situated, and not in the county where the land office is.

Durant v. Corbin, 94 Fed. 382 (1899). C. C. D. Wash. Where claims are within the boundaries of a tract once set apart as an Indian Reservation, and not opened to occupation by white people for any other purpose than mining, the mineral character of the land must be established before the court will find either claimant in an adverse suit entitled to a patent.

Yellow Aster Min. & Mill. Co. v. Winchell, 95 Fed. 213 (1899). C. C. S. D. Cal. The fact that suit is brought under Rev. St. 2326 does not exempt complainant from the necessity of showing that the value of the property in controversy is sufficient to bring it within the requirement of the general statute prescribing the jurisdiction of the circuit courts of the United States.

The complaint should also show affirmatively whether the ground is lode or placer.

Young v. Goldstecn, 97 Fed. 303 (1899). D. C. D. Alaska. The owner of an unpatented town lot in Alaska may adverse an application for patent for a lode claim, and may maintain an action in a court of competent jurisdiction in support of such adverse. The proceedings directed and authorized by Rev. St. 2326 may be either by suits in equity or actions at law; the former when the plaintiff is in possession, and the latter when he is out of possession of the premises.

Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 44 Law. Ed. 276 (1900). An action on an adverse claim under Rev. St. 2325 and 2326 is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a federal court, regardless of the citizenship of the parties, where no question is raised as to the meaning or construction of the statutes of the United States. The intention of congress was to leave open to suitors all courts competent to determine the right of possession. This case in effect overrules the decision in the courts of the ninth circuit to the contrary in *Burke v. Bunker Hill & S. Min. & Concentrating Co.*, 46 Fed. 644 (see vol. 1, p. 392); *Shoshone Min. Co. v. Rutter*, 87 Fed. 801; *McFadden v. Mountain View Min. & Mill. Co.*, 97 Fed. 670; *Nevada Sierra Oil Co. v. Miller*, 97 Fed. 681.

Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 Law. Ed. 864 (1900). A suit brought in support of an adverse claim under Rev. St. 2325, 2326, is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a federal court, regardless of the citizenship of the parties. Although such a suit may so present questions arising under the Constitution and laws of the United States that the federal courts will have jurisdiction, yet the mere fact that the suit is an adverse suit authorized by the statutes of congress is not in and of itself sufficient to vest jurisdiction in the federal courts.

DeLamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 Law. Ed. 872 (1900). Same point as last case above.

Plaintiff based his right to recover on the act of congress suspending forfeiture for failure to do annual work. This raised a federal question, but as the decision of the court below was in favor of the right claimed, the defendant is not entitled to a writ of error, which only lies where the decision is adverse to that right.

Larned v. Jenkins, 48 C. C. A. 252, 109 Fed. 100 (1901). 8th Circ. "The mere fact that an action is brought, pursuant to the requirements of Section 2326 of the Revised Statutes, to determine who has the better right to the possession of a mining claim, does not in and of itself establish that it is a case of federal cognizance."

Mountain View Min. & M. Co. v. McFadden, 180 U. S. 533, 45 Law. Ed. 656 (1901). A suit brought in support of an adverse claim under Rev. St. 2325 is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on the federal court, regardless of the citizenship of the parties; nor in order to confer such jurisdiction will the court take judicial notice of the fact that the claim in controversy was located upon an Indian Reservation, and of the act of congress declaring a portion of that reservation to have been restored to the public domain, no claim based on these facts having been stated in the complaint.

Larned v. Jenkins, 51 C. C. A. 344, 113 Fed. 634 (1902). 8th Circ. An action of ejectment based on a patent issued prior to the initiation by the defendant of the claim for which he has applied for a patent is not inconsistent with a claim adverse to that application under Rev. St. 2326, and such an adverse claim does not estop the plaintiff from maintaining his action.

Beals v. Cone, 188 U. S. 184, 47 Law. Ed. 435 (1903). The mere fact that an action on an adverse claim is brought in a state court does not of itself entitle the defeated party to a writ of error to this court. Although brought under the authority of a federal statute, the questions involved may be only of general or local law. Such is the case where matters of fact as to discovery, the character and general nature of the deposits only, are involved.

Mackay v. Fox, 57 C. C. A. 439, 121 Fed. 487 (1903), 9th Circ., affirming *Fox v. Mackay*, 1 Alaska, 329. Where two conflicting applications overlap, and, upon application of the owner of one for a patent, adverse proceedings under the statute are instituted by the owner of the other, if the latter thereafter amend his application, excluding therefrom the land in dispute, and a patent be issued to him also excluding this land, such application and patent are not an acknowledgment that the applicant relinquishes all claim to the ground in dispute, and therefore are not such a waiver of the adverse claim as settles the adverse suit, under Rev. St. 2326.

Goldstein v. Behrends, 59 C. C. A. 203, 123 Fed. 399 (1903). 9th Circ. An application for a patent for a mining claim was adversely by another who claimed under a townsite entry. In proceedings to sustain such adverse claim, a decree was entered in favor of the adverse claimant. Pending an appeal by the applicant from this decree, the land office held, in certain other proceedings to which the applicant was a party, that the land in question was not mineral land, and a patent was issued for the land by the land office under the townsite entry. Held that this decision was conclusive upon the court in the present proceedings, that therefore no actual controversy remained between the parties, the adverse claimant having now both title and possession of the land, and the appeal was accordingly dismissed.

Tonopah Fraction Min. Co. v. Douglass, 123 Fed. 936 (1903). C. C. D. Nev. Actions in support of adverse claims are of purely statutory origin, having their inception in the land office, not in the court where the suit is commenced, and, since the statute does not provide the form of such actions, their form and the pleadings therein may be determined by state legislation. Under the Nevada statute passed for this purpose (Cuttings' Comp. Laws, § 3985) the plaintiff need not set out specifically the character of his own title, or the alleged title of the defendant; it is sufficient simply to allege that plaintiff is the owner and in possession of the property, describing it, and that the defendant is unlawfully asserting a claim there-to adverse to him. It seems that a bill framed in accordance with the requirements of the state statute is sufficient to support such an action brought on the equity side of the federal court.

Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S. 220, 48 Law. Ed. 944 (1904). Applications for patents based on lode locations were adversely by claimants who had previously located the land as placer, and in the action on the adverse claim the latter prevailed. This did not settle their right to a patent beyond the reach of inquiry by the government nor did it necessarily give them the right to the lodes in controversy. The judgment of the

court is "to determine the right of possession." It does not go beyond that. The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent, and the sufficiency of that proof is for the land department. "The land office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it." See this case also on pages 381 and 428.

Stevens v. Grand Cent. Min. Co., 67 C. C. A. 284, 133 Fed. 28 (1904). 8th Circ. The provision of Rev. St. 2325, that if no adverse claim is filed within 60 days of publication of the notice of application for a patent it shall be assumed that the applicant is entitled to such patent, has reference to an adverse claim arising from independent and conflicting locations of the same ground and not to a controversy between co-owners or others claiming under the same location.

Willitt v. Baker, 133 Fed. 937 (1904). C. C. W. D. Ark. A court of equity is a court of competent jurisdiction within the meaning of Rev. St. 2326, even where neither party is in possession of the property. where there is a state statute (§ 6120, Sand & H. Dig., Arkansas) providing that an action may be brought by a person, whether in actual possession or not claiming title to real estate, against any person whether in actual possession or not, who claims an adverse interest therein, for the purpose of quieting the title to said real estate. State statutes enlarging the power of courts of equity will be enforced in the federal courts unless they infringe upon Rev. St. 723, inhibiting suits in equity in any case where there is a plain, complete and adequate remedy at law.

Where the contest in the land office on an adverse claim is begun by the original locators, but, between the institution of the adverse claim and the institution of the suit in support thereof, the title becomes vested in one of them alone, the latter has the right to institute the suit in his own name for his own interest. In such a suit the title of each party is brought in question, and each must make proof of his title before he can ask a judgment in his favor.

Creede & Cripple Creek Min. & M. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 49 Law. Ed. 501 (1905), affirming 119 Fed. 164. A tunnel claimant is not bound to adverse an application for patent for a lode claim, prior to the discovery of a lode in the tunnel, although the tunnel extends through the ground of the lode claim. The tunnel claimant consequently loses no rights by reason of his failure to adverse.

"Reading these two sections together it is apparent that they provide for a judicial determination of a controversy between two parties contesting for the possession of 'land claimed and located for valuable deposits;' in other words, the decision of a conflict between two mining claims, a decision which will enable the Land Department without further investigation to issue a patent for the land. A tunnel is not a mining claim, although it has sometimes been inaccurately called one. As we have seen, it is only a means of exploration. The owner has a right to run it in the hope of

finding a mineral vein. When one is found he is called upon to make a location of the ground containing that vein and thus creates a mining claim, the protection of which may require adverse proceedings. As the claimant of the tunnel he takes no ground for which he is called upon to pay, and is entitled to no patent. A judgment in adverse proceedings instituted by him (if such proceedings were required) might operate to create a limitation on the estate of the applicant for a patent to the mining claim, and thus, as it were, engraft an exception on his patent. But taking the whole surface the applicant is required to pay the full price of five dollars per acre with no deduction because of the tunnel. The statute provides for no reduction on account of any tunnel. The tunnel owner might be said to have established his right to continue the tunnel through the lode claim after patent, a right which he undoubtedly had before patent, or at least before entry. There is no statutory warrant for placing in a patent to the owner of a lode claim any limitation of his title by a reservation of tunnel rights."

McMillen v. Ferrum Min. Co., 197 U. S. 343, 49 Law. Ed. 784 (1905). Where in the state courts the question was treated as one of local law, the fact that the suit was brought under Rev. St. 2326, to try adverse rights to a mining claim, does not necessarily involve a federal question so as to authorize a writ of error from this court.

Laragnino v. Uhlig, 198 U. S. 443, 49 Law. Ed. 1119 (1905). Where the necessary effect of the ruling of the state court is to deny to a locator of a mineral claim the protection of the relocation provisions of § 2324, Rev. St., if that section justified the claim based upon it, or if the record shows that the trial court considered that the plaintiff specially claimed and was denied rights under § 2326, Rev. St., authorizing an adverse of an application for a patent to mineral lands, a federal question is involved and the motion to dismiss the writ of error will be denied.

Nowell v. McBride, 162 Fed. 432 (1908). 9th Circ. It is not a defense to an action for specific performance of a contract to sell mining property that the owner had subsequently applied for and obtained a patent and the plaintiff had failed to file an adverse claim. He was not required to do so. He did not claim adversely to the patent, but under it; the purpose of the suit was to establish and enforce a trust.

Alaska.

Behrends v. Goldstecn, 1 Alaska, 518 (1902). A town lot claimant cannot adverse an application for patent for a mining claim where the town lot claimed is within the exterior boundaries of the lode mining claim. To hold otherwise would be to hold that the courts should determine whether land is mineral or nonmineral, whereas that power is vested solely in the land department of the government. A protest filed in the land office by the town lot claimant would raise the question of the mineral or non-mineral character of the land, and the interior department would thereupon determine that question; a paper prepared as an adverse, when not

properly in the land office as such, is often received and accepted as a protest, and is permitted to serve that purpose. (See this case on appeal on page 445, above.)

Nome-Sinook Co. v. Simpson, 1 Alaska, 578 (1902). Congress did not intend by Rev. St. 2325 and 2326, and the amendatory act of 1881, to prescribe jurisdiction in any particular court, state or federal. The local trial court may determine the action, without any controversy arising as to the acts of congress in relation to patent proceedings, and therefore no federal question is necessarily involved. The state or local court is guided and controlled as to jurisdiction, practice, and procedure only by the regulations and customs of the mining district and the state or territorial statutes, the law of the forum. No power or jurisdiction is conferred upon the local courts by the provision in relation to patent proceedings, nor are their general powers or jurisdiction limited in any respect thereby.

It follows from these propositions that a suit brought in an Alaska court in support of an adverse, while it is a step required by the act of congress in aid of the land office proceeding, is supported by the jurisdiction which such court possesses by virtue of the Code of Alaska, both as to parties and subject matter. Therefore a third party may intervene in such suit, even though he did not file an adverse claim in the land office.

It may be that such intervener, not having filed such adverse, cannot procure a patent, but he has the right to contest the claims of the applicant and the adverse claimant to such patent, and, if the intervener is the real owner of the property, and the court shall so determine by its judgment, the result will be that neither the applicant nor adverse claimant will receive a patent, whereby the rights of the intervener will be fully protected.

Arizona.

Allyn v. Schultz, 5 Ariz. 152, 48 Pac. 960 (1897). In an action on an adverse claim under Rev. St. 2326, whatever its form, the plaintiff must allege and prove citizenship.

In such an action each party must establish his right to the ground in controversy against the United States as well as against his adversary. Plaintiff must allege and prove every step necessary to establish his right that would be required in the land office for a patent, with the exception of advertisement and surveyor general's certificate. He must recover on the strength of his own title, not on the weakness of his adversary's.

Providence Gold Min. Co. v. Burke, 6 Ariz. 323, 57 Pac. 641 (1899). An action on an adverse filed in the land office to contest the right of an applicant for a patent for a mining claim is not a common-law action, and the parties are not entitled, as a matter of constitutional right, to a verdict by a common-law jury.

Keppler v. Becker, 9 Ariz. 234, 80 Pac. 334 (1905). The form of the action brought to establish an adverse claim under the provisions of Rev. St. 2326 may be either at law to recover possession or one in the nature

of a suit to quiet title, but in either case the plaintiff must allege the facts which will entitle him to the possession of the ground in controversy against the government as well as against his adversary. Where the plaintiff's complaint does not allege such necessary facts, and he files an amended complaint to remedy the deficiency, but more than 30 days after the adverse claim was brought in the land office, such amended complaint does not relate back to the time of the filing of the original complaint so as to prevent the running of the 30 days' limitation prescribed by the statute.

Smith v. Imperial Copper Co., 89 Pac. 510 (1907). Rev. St. 2326 provides that an adverse claim "shall show the nature, boundaries and extent of such adverse claim" and also that "a patent shall be issued for the claim or such portion thereof as the applicant shall appear from the decision of the court to rightly possess." It is therefore necessary that the judgment of the court should designate the part, if any, of the area in conflict, belonging to each of the claimants, and consequently, in order to sustain such a judgment, a definite description, in the complaint, of the area in conflict is necessary. A complaint is defective if it merely states that defendant claims the whole, or almost the whole, of plaintiff's claim.

Arkansas.

Matlock v. Stone, 77 Ark. 195, 91 S. W. 553 (1905). In an action of an adverse claim, citizenship is a material fact which must be alleged and proved. See this case also on page 256.

California.

Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047 (1896). Temple, J.: "Congress could not impose upon the state courts the duty or the labor of determining for the land office who is entitled to purchase from the United States and it has not attempted to do so. Nothing is referred to the state courts for trial. But the contestant is required to test his right to the possession of the mining ground in the local courts. This he must do—if in a state court—by some proceeding authorized by the laws of the state. * * * This is not an action brought under Sec. 2326 of the Rev. Stats. of the U. S. to determine which of the parties is best entitled to purchase from the United States, but only an ordinary action to quiet title. The proceedings in the land office of the United States are utterly immaterial here, unless they tend to show title or right of possession in one of the parties." It was therefore error to instruct the jury to find against plaintiff on the ground that it did not appear that he had begun suit within thirty days after filing his claim in land office.

Doon v. Tesh, 131 Cal. 406, 63 Pac. 764 (1901). Where a person interposes an adverse claim to an application for a patent for a mining claim, he must, within thirty days after filing his adverse claim, commence proceedings in the proper court to determine the right of possession, and must prosecute

the same with reasonable diligence to final judgment. Where judgment in such proceedings is rendered against the adverse claimant, and he serves a statement on motion for a new trial, and then takes no further steps for ten or twelve years, the original claimants are entitled to have the proceedings dismissed for want of prosecution, in order that they may avail themselves of their judgment and secure their patent from the government.

Gruwell v. Rocco, 141 Cal. 417, 74 Pac. 1028 (1903). Rev. St. 2326 makes it the duty of an adverse claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession. But this question must be determined by the state courts in a proceeding authorized by the laws of the state, and not by reason of the revised statutes. The proceedings in the land department, the citizenship of the parties, and other matters, may be heard by the trial court for the purpose of determining who is entitled to the possession, but they are only matters of evidence to aid the court in arriving at the ultimate fact. The state court does not concern itself with the question as to whether or not its judgment can be used in the land office. And it cannot adjudge that one of the parties is "entitled to purchase" the claim from the government of the United States and receive a patent therefor; such a decree is in excess of the jurisdiction of the court because it attempts to determine a matter which it is the province of the land department of the United States to determine.

Schroder v. Aden Gold Min. Co., 144 Cal. 628, 78 Pac. 20 (1904). A suit brought in support of an adverse claim must be governed and determined by the practice and rules of pleading governing in the state courts in ordinary suits brought to settle disputes as to interests in land. The plaintiff must obtain judgment on the strength of his own title, and, if it be shown that he has no title, it becomes immaterial to inquire into defendant's rights.

Bernard v. Parmelee, 6 Cal. App. 537, 92 Pac. 653 (1907). Where an adverse claim was filed on the last day of the period of publication and suit thereon was instituted on the last of the thirty days thereafter, but summons was not served for another six months, the action was dismissed for want of due diligence and prosecution. What is due diligence is a question for the court to determine and not for the land department.

Colorado.

German Ins. Co. v. Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206 (1895). See this case on page 429.

Michael v. Mills, 22 Colo. 439, 45 Pac. 429 (1896). An action in a state court in support of an adverse claim is not an ordinary action to recover the possession of real property, but, in effect, involves the validity of the respective locations under the mining laws.

Currency Min. Co. v. Bentley, 10 Colo. App. 271, 50 Pac. 920 (1897). In an action on adverse claim when there was some evidence showing that

both parties had rights to parts of the area in conflict, it was error to refuse to charge that "if you find from the evidence that both parties to the action are entitled to separate and different portions of the premises in conflict, you may so find and return a description of the ground accordingly." Such a division is permissible under Code, § 269, subd. 5, and Rev. St. 2326.

Fleming v. Daly, 12 Colo. App. 439, 55 Pac. 946 (1899). Where in an action on an adverse claim it appeared that the property belonged either to the plaintiff or to the defendant by a good and valid possessory title, it is not error to refuse a requested instruction that under the act of Congress of March 3, 1881, if neither party had complied with the law in the matter of location, then neither was entitled to a verdict.

Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207 (1901). The provision of Rev. St. 2332, that evidence of the possession of a mining claim for a period equal to the time prescribed for the running of the statute of limitations for mining claims of the jurisdiction shall be sufficient to establish a right to a patent in the absence of any adverse claim, is not available in an action brought in support of an adverse against an application for patent, for its language necessarily implies that possession in the applicant for the statutory period is of no avail as against an adverse claim based upon a conflicting location, except it might be in such action that proof of such possession would be sufficient upon which to presume that all steps necessary to effect a location of the claim adversely had been taken. Where the answer puts in issue all the acts necessary to constitute a valid location, the plaintiff cannot recover judgment, if he offers no evidence that the location was on unappropriated mineral land.

Kirk v. Meldrum, 28 Colo. 453, 65 Pac. 633 (1901). Where, in an adverse suit, the plaintiff is nonsuited, the defendant may offer no evidence and move to have the cause dismissed, without violating the provisions of the amendment to Rev. St. 2326, that if, in adverse proceedings, neither party establishes title to the ground in controversy, the jury shall so find.

Carnahan v. Connolly, 17 Colo. App. 98, 68 Pac. 836 (1901). The dismissal of an action on an adverse claim for want of prosecution is not obnoxious to Rev. St. 2326, or the amendment thereof. *Kirk v. Meldrum*, followed.

Pennsylvania Min. Co. v. Bales, 18 Colo. App. 108, 70 Pac. 444 (1902). Where there is an allegation in a complaint that an adverse has been filed in the land office, the opposing party must raise the question as to whether it was filed within the sixty days of publication, by demurrer or answer. If he go to trial without raising it thus, he cannot take advantage of the failure of the complainant to state the fact.

Connolly v. Hughes, 18 Colo. App. 372, 71 Pac. 681 (1902). In an action on an adverse claim, "the waiver of his claim by the adverse claimant, or a final judgment in favor of either party, does not conclude the general government. If there has been a failure of compliance with the terms upon which its grant of title is conditioned, proceedings may be instituted in its behalf and in its name to arrest the issuance of patent, or to annul

it after it is issued; but to a suit between individual claimants of a portion of its domain it is not a party, and is interested incidentally only to the extent that upon the trial of the issues between the parties to the record neither shall have judgment unless he shall have established his title." When, in such an action, the adverse claimant offers no evidence and makes no effort to sustain his alleged title, he is not entitled to have the jury sent by the court to view the premises, as provided in § 188a, Mills' Anu. Sts.

Rawlings v. Casey, 19 Colo. App. 152, 73 Pac. 1000 (1903). The complainant in order to state a cause of action in an adverse suit need not aver that the adverse claim was filed in the land office within sixty days from the commencement of publication of notice of application for patent.

Moffat v. Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139 (1905). In an action in support of an adverse claim, the plaintiff must not only show his own discovery and location, but also, to make out a prima facie case, must establish that the ground was not covered by a prior location, or, if it should appear from his testimony that the land was covered by a prior location, that such location was invalid, that the claimant had forfeited his right to the land by failure to comply with the law, or that the claim had been abandoned. If this burden of proof is not sustained, the plaintiff should be nonsuited, and thereafter the proceedings become ex parte and the plaintiff is no longer interested in the litigation and cannot make any further objections.

McWilliams v. Winslow, 34 Colo. 341, 82 Pac. 538 (1905). The location or relocation of a mining claim can be made only upon unoccupied and unclaimed public domain, and in an adverse it is incumbent upon plaintiffs to show, as one of the material facts necessary to establish the validity of their location, that the ground they seek to locate was unoccupied and unappropriated public mineral domain subject to location.

Under act of Congress of March 3, 1881, if title to the ground in controversy is not established in either party the jury shall so find, and judgment shall be entered accordingly. The jury, however, is not required to make any findings. Plaintiffs having failed to make out a prima facie case, defendants are entitled to a nonsuit; defendants are not bound to have their title established in such an issue.

Hoban v. Boyer, 37 Colo. 185, 85 Pac. 837 (1906). In an action on an adverse claim, the defendant may show that plaintiff's location was made upon ground within a prior, valid subsisting location, and if he succeeds in this it is a bar to plaintiff's recovery.

Davidson v. Fraser, 36 Colo. 1, 84 Pac. 695, 4 L. R. A. (N. S.) 1123 (1906). Sections 2325 and 2326, Rev. St., apply only to adverse claims arising out of independent conflicting locations of the same ground, and not to controversies between co-owners claiming under the same location. There is no statute prescribing the steps which shall be taken by an owner of an interest in a mining claim from which he has been so excluded. But Rule 58 (53 of the present regulations) of the Land Department provides in substance that the claimant of a present interest in a mineral

location who is excluded from the application for patent thereon may protest against the issuance of a patent, and such protestant will be deemed a party in interest entitled to appeal. Under this rule the practice is, when an owner of an interest so excluded has filed his protest, to direct that a suit be brought in support of such protest, and await the result of such action before issuing patent.

Under Colo. Civ. Code, § 275, a tenant in common whose right has been denied may bring an action for the possession of his interest against his co-owner; and in this case the plaintiff could maintain his action under that statute independently of the fact that he had filed a protest in the land office. The action of the defendant in excluding the plaintiff by applying for a patent in his own name amounts to a denial of the plaintiff's rights, and cannot be pleaded as a bar to a suit instituted to establish his rights.

Jackson v. White Cloud Gold Min. & Mill. Co., 36 Colo. 122, 85 Pac. 639 (1906). In an action on an adverse claim, it is conclusively presumed that the stockholders of a corporation party are citizens of the state of its origin. It being unnecessary to allege the citizenship of the stockholders of a corporation, it follows that no proof of such citizenship is required under admissions by answer that plaintiff was a corporation organized and existing under the laws of the state of Colorado.

Healey v. Rupp, 37 Colo. 25, 86 Pac. 1015 (1906). The prime purpose of a suit in support of an adverse is to determine, for the information of the officers of the land department, which, if either, of the parties thereto is entitled to be vested with the fee of the premises in dispute by purchase from the government.

"The notices required to be given of an application for patent are in effect a summons to all adverse claimants. The latter must assert their rights by filing an adverse within the 60 days' publication of notice of application for patent. Unless filed within that period it will be conclusively presumed that none exists. So far, then, as an adverse claimant is concerned, it must necessarily follow that his rights to the premises in controversy must be limited to those existing at the time of filing his adverse. If he had no claim then, he will not be heard to assert a right to the premises in dispute by virtue of one brought into existence thereafter."

Allen v. Blanche Gold Min. Co., 46 Colo. 199, 102 Pac. 1072 (1909). The provisions of Rev. St. 2325 and 2326, in regard to adverse claims, apply only to adverse claims arising out of independent and conflicting locations of the same ground, and not to controversies between co-owners who claim under the same location.

Idaho.

Buckley v. Fox, 8 Idaho, 248, 67 Pac. 659 (1902). See this case on page 400.

Jones v. Pacific Dredging Co., 9 Idaho, 186, 72 Pac. 956 (1903). Jones and others, plaintiffs, commenced an action against the Pacific Dredging

Co. and McNutt to quiet their possession and title to certain placer mining ground. During the pendency of the action the Pacific Dredging Co. made application for a patent to said ground, and in opposition to such application Jones and others filed an adverse claim in the proper land office, and also filed a supplemental complaint in this action which showed the relationship of this suit to the application for patent and adverse claim. Held that this suit may stand as a suit brought under the provisions of Rev. St. 2326 in support of said adverse claim.

Montana.

Murray v. Polglase, 23 Mont. 401, 59 Pac. 439 (1899). One who has not filed his adverse claim in the land office within the 60 days allowed by Rev. St. 2326, and brought suit within 30 days thereafter to establish such claim, cannot intervene in an action to establish an adverse claim brought by another who proceeded within the prescribed time.

Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1 (1901). A judgment creditor has no standing to file an adverse claim. See this case also on page 390.

Reins v. King, 27 Mont. 511, 71 Pac. 763 (1903). Where one fails to make a valid location of a mining claim, and applies for a patent, it is immaterial, so far as his rights are concerned in an action to determine an adverse claim, whether or not there had been a location of the claim by a third party prior to the adverse claimant's location, the latter having been itself prior to the invalid location of the applicant for the patent.

Hopkins v. Butte Copper Co., 29 Mont. 390, 74 Pac. 1081 (1904). "It has been long the rule in this jurisdiction that, in order to state a cause of action under section 2326, Rev. St. U. S., it must be alleged that the adverse claim has been filed within time in the proper land office, and that the action has been commenced within 30 days allowed for that purpose." *Mattingly v. Lewisohn*, 8 Mont. 259. The absence of such an allegation leaves the pleading open to general demurrer, but does not authorize a dismissal of the action for want of jurisdiction, for the jurisdiction of the state courts to determine adverse claims to mining locations is entirely independent of any federal legislation.

Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84, 68 L. R. A. 833 (1904). In an action brought in support of an adverse claim filed against an application for patent to a mining claim, the United States is a quasi party, and if the court is satisfied, upon a trial of the case, that neither plaintiff nor defendant is entitled to a patent to the ground in controversy, it must so find and decide. See this case also on page 343.

Mares v. Dillon, 30 Mont. 117, 75 Pac. 963 (1904). The character of the suit that is brought in support of an adverse claim depends upon the practice in the state in which the suit is brought. If, under the law of the state, an action to quiet title is provided for, such suit will be sufficient; if, under such law, an action of ejectment is provided for, then the action may be in ejectment; if a statutory proceeding is provided for, it may be

followed, but if such proceeding is made exclusive by the statute, then its provisions must be followed.

Where an application for patent conflicts with parts of two claims of another locator, he may file a separate adverse claim and bring a separate suit for each, and the pendency of one suit is not a bar to the other. In an action brought in support of an adverse claim, the court has no jurisdiction to determine any matters with reference to any part of the location of the adverse claimant other than that which conflicts with the location of the applicant for a patent. Upon filing a certified copy of the judgment roll in his favor, the adverse claimant would be entitled to a patent to such area only. If he desires to acquire a patent to the remainder of his location, he will be compelled to make an original application therefor, and comply with the United States statutes and the rules and regulations of the land office. The amendment of 1881 does not require a finding by a jury when the action is in equity. It was not the purpose of the act to provide that actions on adverse claims must always be brought at law and tried by jury.

Woody v. Hinds, 30 Mont. 189, 76 Pac. 1 (1904). In an action in support of an adverse, whether the action be regarded as one to quiet title under § 1310 of the Code of Civil Procedure, or a special statutory proceeding under § 1322, it is not necessary for the plaintiff to set forth with particularity the nature of the defendant's claim. The purpose of the proceeding is to have defendant's adverse claim determined, and the duty is cast upon him to make discovery of his claim in order that the court may properly determine it. In such action the court may allow amendments to pleadings as in other actions, and may, even after the expiration of 30 days, allow an amendment to a complaint so as to make it sufficient to constitute a cause of action.

Helbert v. Tatem, 34 Mont. 3, 85 Pac. 733 (1906). The complaint in an action on an adverse claim need not state when the first publication of notice of application was made, if it otherwise appears that the adverse claim was filed in time.

Helena Gold & Iron Co. v. Baggaley, 34 Mont. 464, 87 Pac. 455 (1906). Where neither plaintiff nor defendant in an action upon an adverse claim establishes a right to the claim in question, the verdict must so show, since the government is a quasi party to the suit.

Thornton v. Kaufman, 35 Mont. 181, 88 Pac. 796 (1907). In Montana the complaint in a suit on an adverse claim must, in order to state a cause of action, allege, inter alia, that the adverse claim was filed in the proper land office within the period of publication, and that the action was brought within 30 days after the filing of the adverse claim. If the complaint contained allegations sufficient in other respects, the court would judicially know whether the suit were brought within 30 days after the filing of the adverse claim, but, in any event, the fact must appear upon the face of the record.

Butte Con. Min. Co. v. Barker, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177 (1907). An action upon an adverse claim being in effect a suit in equity, the parties are not entitled to a trial by jury.

Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 95 Pac. 995 (1908). If the plaintiff in an action on an adverse claim fails to establish a right in himself to the land in controversy, he will not be heard to object to the sufficiency of the defendant's declaratory statement. The admissibility of an amended declaratory statement is not affected by reason of its having been filed after the filing of the adverse claim and the commencement of action thereon.

Lozar v. Neill, 37 Mont. 287, 96 Pac. 343 (1908). In an adverse suit to make out a prima facie case, plaintiff is required to establish, in addition to the other requirements of the law, that the ground was not covered by a prior location, or, if it should appear from his testimony that the land was covered by a prior location, that such location was invalid, that the claimant had forfeited his right to the land by failure to comply with the law, or that the claim had been abandoned. If he fails in this he must be nonsuited. After the nonsuit is granted the proceedings become ex parte and the plaintiff has no further right to participate in the trial, which then consists in the production of evidence by the defendant to establish whether either party is entitled to patent.

Nevada.

Nesbitt v. DeLamar's Nev. Gold Min. Co., 24 Nev. 273, 53 Pac. 178 (1898). The practice of the department is to recognize an application or adverse signed by one joint owner in behalf of himself and his co-owners. Such an act manifestly done for the benefit of all would be presumed to be authorized or at least ratified.

Harris v. Helena Gold Min. Co., 29 Nev. 506, 92 Pac. 1 (1907). What is requisite to constitute the commencement of proceedings under Rev. St. 2326 is a question of local law. The federal enactment is mandatory as to the time within which proceedings must be commenced, but those proceedings must be in conformity with the law of the state. If both a summons and a complaint are necessary to the commencement of proceedings under the state law, neither can be dispensed with unless waived by the defendant.

New Mexico.

Deency v. Mineral Creek Milling Co., 11 N. M. 279, 67 Pac. 724 (1902). An ordinary declaration in ejectment is sufficient. under §§ 2290, 2291, Comp. Laws 1897, to present all the questions involved between an applicant for patent for a mining claim and an adverse claimant.

Upton v. Santa Rita Min. Co., 14 N. M. 96, 89 Pac. 275 (1907). Although in a proceeding upon an adverse claim each party can recover only on the strength of his own title, an ordinary declaration in ejectment is sufficient to present all the issues involved. It is essential, however, that it should set forth that it is intended as a proceeding on an adverse to an application for patent to a mining claim. Under such pleading a verdict of guilty is sufficient to establish the plaintiff's title.

South Dakota.

Mars v. Oro Fino Min. Co., 7 S. D. 605, 65 N. W. 19 (1895). In this state proceedings on an adverse claim are not commenced by merely placing the summons in the hands of the sheriff; the plaintiff must see that it is served within a reasonable time. A delay of almost two years is not reasonable and the proceeding will be dismissed on the ground that it was not commenced within the time required by the act of congress.

McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 50 L. R. A. 184 (1898). In an action on an adverse claim, the citizenship of one or other of the claimants, and the rights to the mining claim dependent thereon, cannot be questioned.

Sands v. Cruikshank, 15 S. D. 142, 87 N. W. 589 (1901). In an action to determine adverse claims to mining ground, where the defendant's title to the ground in dispute rests upon an alleged lode location initiated prior to that of the plaintiff, the burden is on the defendant to establish the fact of an actual discovery prior to the initiation of the plaintiff's location.

Utah.

Bunker Hill Min. Co. v. Pascoc, 24 Utah, 60, 66 Pac. 574 (1901). Where one occupies and works a claim under a lease from the owner, paying royalty therefor, and, as a further consideration for said lease, agrees to procure a patent for the claim at his own expense but in the name of the owner, he is estopped to deny such owner's right to the ground covered by the lease, in an action on an adverse claim filed by him and based on an alleged prior location of his own.

Murray Hill Min. & Mill. Co. v. Harenor, 24 Utah, 66 Pac. 762 (1901). In an action brought under Rev. St. 2326, the object is to determine for the information of the land department which if either of the parties, by a compliance with the mining laws, has acquired the right of possession of the mining premises in controversy. If both fail to establish such title, neither can recover, so that each must rely on the strength of his own title and not on the weakness of his adversary's.

Lily Min. Co. v. Kellogg, 27 Utah, 111, 74 Pac. 518 (1903). An action under Rev. St. 2326 is purely statutory, and state statutes regulating ordinary actions for the recovery of real estate, or for questioning the title thereto, are inapplicable. "It follows that in such statutory actions an allegation by the plaintiff that an adverse claim, in due time and form, showing its nature, boundaries, and extent, was filed in the land office, is traversable and necessary to confer jurisdiction upon the court to decide the controversy and that an action brought in support of such adverse claim must be based upon the right asserted in such claim, for the reason that it must be conclusively assumed that no adverse claim exists, except such as has been filed." Hence, where the adverse claimant claimed one part of the location applied for, the adverse claimant may not bring action in the state court to determine his right of possession to a different part.

Washington.

Stolp v. Treasury Gold Min. Co., 38 Wash. 619, 80 Pac. 817 (1905). In an action on an adverse claim, in which the object sought by the litigation is to defeat the application of the defendant by showing that he was not in possession of the property and is not entitled to possession thereof, the only result of the trial, if the adverse claimant be successful, would be to defeat the other party's claim to a patent. The adverse claimant must do the required work, make an independent application, and conform to the United States statutes and the rules of the land department, before he himself may acquire a patent to his claim.

Wyoming.

Wright v. Town of Hartville, 13 Wyo. 497, 81 Pac. 649 (1905). Rev. St. 2326 confers jurisdiction upon the courts only of suits to determine the right of possession between two or more mining claimants and not to determine the character of the land involved.

This statute only gives the court jurisdiction of suits when the parties are all mining claimants and when the land embraced in the claim is unpatented government land. The court would not have jurisdiction in a suit in support of an adverse claim, where the parties were all mining claimants and a patent had already been issued to one of the claimants; or where one of the parties is a mining claimant and the other a town-site claimant, whether patent had been issued or not; or where one of the parties is an applicant for a patent to mineral land and the other party claims the same or any part of the land embraced in the mining claim, under any of the laws providing for the disposal of nonmineral lands. The court has jurisdiction only where the suit is between adverse mining claimants to the same unpatented mineral land. When the question of the character of the land is in issue, it is one for the land department to decide, and not for the courts.

LAND OFFICE DECISIONS.

A judgment in an action to quiet title begun before the filing of adverse claim, and not based on such adverse claim, is not a judgment thereon, and not, therefore, effective against an application for patent. The plaintiffs in such action are not adverse claimants, but merely amici curiae. *Cain v. Addenda Min. Co.*, 24 L. D. 18 (1897).

Where the character of land has been determined to be mineral by the department, an adverse claim based upon a mill site will not be entertained. The department will proceed in spite of an action pending on such an adverse. "The adverse proceeding contemplated by the statute is for the purpose of determining the right of possession as between parties claiming conflicting mining claims and does not, in my judgment, comprehend a suit in the courts to settle the question as to the character of the land." *Snyder v. Waller*, 25 L. D. 7 (1897).

Where there has been proper posting and publication as required by statute, protestants will not be heard to say that they have not had notice. And if they fail to file protest within the statutory period, they can only be heard as *amici curiae*, calling the attention of the department to the failure to comply with the regulations. *Gowdy v. Kismet Gold Min. Co.*, 25 L. D. 216 (1897).

If after entry the applicant finds it necessary to protect his claim by adverse suit against a conflicting claim, it is incumbent upon the government to take notice of the result and act accordingly. *S. H. Standart*, 25 L. D. 262 (1896).

The patentee of a placer claim is under no legal obligation to file an adverse claim against a conflicting application for a lode claim. *Discovery Placer Claim v. Murry*, 25 L. D. 400 (1897).

A protest filed by persons claiming an undivided interest in the claim is not such an adverse claim as is contemplated by the statute, and will not be recognized as such although suit has been begun thereon. (*Turner v. Sawyer*, 150 U. S. 578, 37 Law. Ed. 1189, followed, and *Gramplan Lode*, 1, L. D. 544; *L. B. Hussey Lode*, 5 L. D. 93; and *Monitor Lode*, 18 L. D. 358, overruled. See vol. 1, p. 409.) *Thomas v. Elling*, 25 L. D. 495 (1897).

In the case of a common conflict between several mining claims, the relinquishment by the applicant in favor of the one who did not adverse is of no effect against an adverse claimant who prior thereto has prosecuted his claim to a favorable judgment.

Where adverse proceedings involving the common conflict are filed and prosecuted, the parties in interest are charged with notice thereof. It is then incumbent upon each adverse claimant to take such action as will determine his right not only as against the applicant but also as against the other adverse claimant.

Notices of application which exclude stated areas "without waiver of rights" do not require the filing of adverse claims to such areas; such an exclusion is either absolute so far as that application or notice is concerned or it is misleading and introduces into the proceeding an uncertainty inconsistent with the purpose of the statute. An adverse claim filed and prosecuted successfully can have no effect as to the areas expressly excluded from the application or confer any right upon such adverse claimant. *Woods v. Holden*, 26 L. D. 198 (1898), affirmed 27 L. D. 375 (1898), 28 L. D. 24 (1899).

Pending suit on an adverse claim, the adverse claimant filed a protest on the ground that the survey was fictitious and fraudulent. This was dismissed. Such a protest will not be entertained pending suit on the adverse claim. *Crown Point Min. Co. v. Buck*, 26 L. D. 348 (1898).

A protestant who fails to file an adverse claim will not thereafter be heard to charge that the claimed discovery of the lode applicant is in fact on land appropriated by the prior location of the protestant or that the labor and improvements shown by said applicant should be credited to the protestant. *American Consol. Min. & Mill. Co. v. DeWitt*, 26 L. D. 580 (1898).

Quere, whether a prior applicant is required to file an adverse claim to a subsequent conflicting application. *Durie Lode*, 27 L. D. 88 (1898).

A protest alleging the absence of a valid discovery presents no ground for action, where prior thereto by final judicial proceedings on an adverse claim the land embracing the claimed discovery was adjudged to the applicant. *Hallett & Hamburg Lodes*, 27 L. D. 104 (1898).

Protestants who have failed to file adverse claims within the time prescribed by statute cannot be heard to charge that the applicants' discovery was upon ground covered by a valid, subsisting prior location. "They waived their right to be heard upon such a charge when they failed to file and prosecute an adverse claim." "Furthermore, the proper court and not the land department is the tribunal authorized to hear and determine upon such allegation."

An entry irregularly allowed during the pendency of a suit on adverse claim will not be canceled, where subsequently such suit is dismissed, leaving the applicant in the same status as if no adverse claim had been filed. *Mutual Min. & Mill. Co. v. Currency Co.*, 27 L. D. 191 (1898).

An adverse claim which meets the requirements of the statute should be accepted although it may not meet the requirements of the Land Office Regulations. (*Anchor v. Howe*, 50 Fed. 366, followed.) *McFadden v. Mt. View Min. & Mill Co.*, 27 L. D. 358 (1898), overruling 26 L. D. 530.

"It is not necessary for one who has prosecuted his adverse claim to judgment in his favor to make an original application for patent for the ground included in such judgment, because under section 2326, Rev. St., it can be patented upon a copy of the judgment roll."

"An applicant for patent who excludes or omits from his application ground, the right to the possession of which has been regularly and judicially determined in his favor, and for which he can obtain patent without embracing it in such application, does not by such exclusion or admission invalidate or waive any claim or right which he would otherwise have." *Woods v. Holden*, 27 L. D. 375 (1898).

Protestants who have failed to file adverse claims within the statutory period will not be heard in support of alleged adverse rights. Such protestant will not be heard to allege failure to comply with local regulations or to do annual work. The former is material only where there is an effort to establish a superior right. The latter is not a condition to obtaining patent but to continued right of possession against others.

Such protestant may, however, raise a question as to discovery or expenditure, and upon sufficient showing a hearing will be ordered as to these at which the burden of proof is on protestant. *Hughes v. Ochsner*, 27 L. D. 396 (1898).

Application was made for patent for H. & R. and the applicant filed a relinquishment of all ground in conflict with the Ruby. The owner of Golden Terry filed an adverse claim and prosecuted the same successfully. Application was then made for patent to Ruby. The owner of Golden Terry filed an adverse, began suit, but subsequently dismissed the same, relying on the judgment in the former suit as an adjudication in his favor. "Hav-

ing been filed before any adverse claim was filed, the relinquishment operated to withdraw from the pending application the land relinquished, and this it accomplished as effectually as if that land had never been included in the application." The former judgment, therefore, did not affect the title to the part in conflict between the Ruby and the Golden Terry. The owners of the latter had not personal notice of the relinquishment and relied on the published notice. Having neglected to examine the record, they must suffer the consequences of their negligence. *Shields v. Simington*, 27 L. D. 369 (1898).

Noyes Placer claim was located Oct. 15, 1878, and application made Dec. 17, 1878, for patent which issued July 28, 1880. The South Star Lode claim was located Dec. 2, 1878, chiefly within the boundaries of the Noyes Placer, and of the dimensions of 1,500 feet in length by 300 in width. Nov. 2, 1886, application for patent was made for the South Star, describing it as 1,500 feet in length by 50 feet in width. After litigation, based on conflict with the placer claim, patent was finally issued for the South Star of the dimensions last given on March 12, 1895.

On Jan. 1, 1888, that portion of the South Star as originally located, lying north of the South Star as applied for and patented, was located as the North Star Lode claim. Application for patent therefor was made Jan. 3, 1890. The owners of the Noyes patented placer adverse this application and the suit was decided in favor of the North Star claimants.

Held, under *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 34 Law. Ed. 155, the owners of a patented claim are not required to protect their rights by adverse claim. Therefore the suit instituted by the owners of Noyes placer "was not an adverse proceeding within the purview of the statute, and the judgment rendered therein, while entitled to great respect, cannot be accorded the conclusive effect which attaches to a judgment rendered in an adverse proceeding as is contemplated by the statute."

Whether the ground of the North Star was excepted from the placer by reason of its inclusion in the original location of the South Star was not decided. In view of the fact that the placer claimants seem to have acquiesced in the judgment of the state court and did not appear to contest the right of the North Star to patent, although notified, the entry of the latter is passed to patent. *North Star Lode*, 28 L. D. 41 (1899).

A judgment in adverse proceedings, whereby part of the ground in conflict is awarded to one party and part to the other, is none the less binding upon the parties and the department because it was made in pursuance of a stipulation between the parties.

The department may not, because of that fact, go behind and override the judgment and determine for itself, according to the evidence in the case, the question of right of possession. *Greater Gold Belt Min. Co.*, 28 L. D. 398 (1899); *Federal Gold Min. & Mill. Co.*, 29 L. D. 71 (1899).

Proceedings in the form of an adverse claim and suit thereon, instituted by one holding under an existing entry against a subsequent application erroneously entertained, do not constitute a recognition of the validity or regularity of that application, or divest, waive or suspend rights acquired

by the entry. *Morgan v. Antlers-Park-Regent Consol. Min. Co.*, 29 L. D. 114 (1899).

A judgment in adverse proceedings instituted by a placer claimant against a lode applicant, whereby the possession of the land in controversy is awarded to the adverse claimant, cannot be made the basis of a lode entry by him, where, in his adverse claim and in the pleadings in the suit, he rests his right to the land on his alleged placer claim and alleges that there are no known lodes or veins therein.

The adverse claim in such case will not be disregarded on the ground that the land had been held to contain no placer deposits in a previous decision of the department (11 L. D. 441), where said adverse claim has been recognized by departmental decision (22 L. D. 527), sustained by the trial court, and the suit was still pending on proceedings in error in which a supersedeas has been allowed. *Clipper Min. Co. v. Searl*, 29 L. D. 137 (1899).

A protest filed by one who has failed to file an adverse claim, and containing allegations of adverse ownership and failure to perform annual work, presents no question for the consideration of the department. The allegation of adverse ownership has no other effect than to give the protestant a status under the rules of practice somewhat different from that of one who alleges no interest, in that he is accorded appeal as a matter of right. The performance of annual work is not a condition of obtaining patent. *Opie v. Auburn Gold Min. & Mill. Co.*, 29 L. D. 230 (1899) ; *Belk v. Nickerson*, 29 L. D. 662 (1900).

A judgment rendered on stipulation between parties in adverse proceedings is conclusive as to the right of possession and binding on the department. *Carrie S. Gold Min. Co.*, 29 L. D. 287 (1899).

The manner in which a court ascertains the facts in a suit on adverse claim, whether by stipulation or otherwise, is a matter which in no way affects the conclusive and binding force of the judgment rendered therein upon the parties and the department. *Barney Conicay*, 29 L. D. 388 (1899) ; *J. Arthur Connell*, 29 L. D. 574 (1900).

The departmental regulation that the plat of an adverse claim must be made by a deputy United States surveyor is not an indispensable requirement, if the adverse claim clearly and definitely notifies the applicant of the nature, boundaries and extent of the alleged adverse right. *Kinney v. Von Bokern*, 29 L. D. 460 (1900).

If an adverse claimant entrusts his claim to the mail, he takes the risk of delay and miscarriage incident thereto. The department cannot extend the period within which the claim must be filed. The statutory requirement is mandatory. *Gross v. Hughes*, 29 L. D. 467 (1900).

"The mining laws do not authorize or provide for adverse proceedings against an applicant for patent to mineral land by one claiming the same, or any part thereof, under laws providing for the disposal of nonmineral lands. The provisions of sections 2325 and 2326 relative to adverse claims contemplate proceedings to determine only the right of possession as between claimants of the same unpatented mineral lands; and not to decide

controversies respecting the character of public lands, that is, whether they are mineral or nonmineral lands." One claiming under a townsite patent has, therefore, no standing as an adverse claimant against an applicant for a mineral patent. The question between these parties must be decided by the department. *Ryan v. Granite Hill Min. & Development Co.*, 29 L. D. 522 (1900).

Failure in prosecuting an application to completion within a reasonable time after the termination of proceedings on adverse claim will be treated as a waiver of rights obtained under those proceedings. *Cain v. Addenda Min. Co.*, 29 L. D. 62 (1899). See this case on page 423.

This applies also to rights obtained under a judgment in opposition to the application of another. *Reins v. Montana Copper Co.*, 29 L. D. 461 (1900).

"The assumption declared in sec. 2325 of the Rev. Stats., that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication." *P. Wolenberg*, 29 L. D. 302 (1899). See, also, *Coleman v. McKenzie*, 29 L. D. 359, page 424.

Rev. St. 2325 is a statute of repose only so far as to bar the assertion of adverse claims not filed within the period of publication. It does not relieve the land department from ascertaining the character of the land sought to be patented. "The land department is charged with the duty of disposing of the public lands in the manner provided by law, and its officers must determine the character of the land and dispose of it only under the law applicable thereto. That nonmineral land cannot be disposed of under the mining laws is a cardinal rule in the administration of the public land laws." *Ferrell v. Hoge*, 29 L. D. 12 (1899).

An objection to a mineral application for the reason that the discovery shaft and improvements are upon ground specifically excluded from the published notice of application is not tenable, where in adverse judicial proceedings the ground so excluded has been awarded to the applicant.

A failure to file an adverse claim against an applicant for mineral patent is a waiver of all right to the ground in conflict; and a judgment obtained in adverse proceedings against the subsequent application of another is of no avail as against such waiver, or as against a judgment obtained by one who successfully adverseed the first applicant.

Where a party has two applications pending at the same time, each of which embraces ground in conflict with other locators, and such ground is awarded to the applicant in judgments secured in adverse proceedings, he may, at his election, take the same under the senior application.

It is not material to the rights of an applicant under a favorable judgment obtained in adverse proceedings that an adverse suit is still pending between the losing party in such proceedings and a third party, where a

favorable judgment against the third party for the same ground has already been secured by the applicant.

A judicial award to the junior locator, made in adverse proceedings, of a small part of the ground in conflict, is none the less binding upon the parties and the land department because made in pursuance of a stipulation between the parties. *Stranger Lode*, 28 L. D. 321 (1899).

By the withdrawal of an adverse claim, the claimants waive whatever right they had under the mining laws, and leave the possessory right in the applicant. *Brady's Mortgagee v. Harris*, 29 L. D. 89 (1899).

One who located a claim under provisions of the act of 1866 before the passage of the act of 1872 must file an adverse claim in order to protect his rights as against an applicant for patent for conflicting ground. *Brady's Mortgagee v. Harris*, 29 L. D. 426 (1900).

Where there is no surface conflict, an allegation by a protestant that to allow the entry will injuriously affect his extralateral rights does not raise a question cognizable by the department. That is a matter for the determination of the courts and is not adjudicated by the issue of a patent. *Belk v. Nickerson*, 29 L. D. 662 (1900).

O. made application for patent expressly excluding ground which conflicted with the application of T., who however subsequently relinquished his ground. B. filed an adverse claim to O.'s application, claiming the excluded ground as well as part of the ground expressly claimed by O. Suit was brought on this claim, and both portions of the conflict were included. That which had been excluded from O.'s application and excluding the rest. B. then made application for patent including the part of the rest. Held (1) The part of the conflict included in B.'s application, having been excluded from O.'s application, was not affected by the suit brought on B.'s adverse claim, and (2) O. having failed to adverse B.'s application, the land office would not entertain an objection by him to the issuance of a patent to B., based merely on an assertion of priority of location. *Burnside v. O'Connor*, 30 L. D. 67 (1900), affirming 29 L. D. 301 (1899).

The pendency of an action on an adverse claim stays all proceedings on the application beyond the completion of publication and the filing of proof thereof. This is by reason of Rev. St. 2326. The pendency of a protest filed in the land office, by reason of departmental practice, has the same effect. *Marburg Lode Min. Claim*, 30 L. D. 202 (1900).

Where an adverse is filed to an application for patent to a mining claim, and pending the disposition of the action brought in support of the adverse the adverse claimant applies for, and through the inadvertence of the local officers is allowed entry upon, a claim which includes the subject of conflict in the pending action, the entry will be canceled to the extent of the conflict. *Long John Lode Claim*, 30 L. D. 298 (1900).

Where a protest against the issuance of a patent involves disputed claims under a local statute of limitations and questions of fraud due to a claimed secret understanding as to the effect of conveyances of undivided interests in a mining claim alleged to have been made without any consideration, proceedings will be suspended in the land department until the matter is

litigated and determined in the courts where the property lies. *Coleman v. Homestake Min. Co.*, 30 L. D. 364 (1900).

The ruling in *Marburg Lode Mining Claim*, supra, applies only to an action which has for its end the decision of a controverted question of the right of possession, and maintains its character up to the time of its final determination. It does not apply to a dead suit, subsisting solely as a matter of record and within the power of the applicant to cause to be dismissed. *Ring v. Montana Loan & Realty Co.*, 33 L. D. 132 (1904). See this case also on page 427.

A suit involving the question of the right of possession, commenced prior to the filing of the application for patent, notice of which was given to the department after the expiration of the period of publication, no adverse claim having been filed during that period, is not such a proceeding in court as is contemplated by Rev. St. 2326, and does not stay the proceedings for patent. While the department may under its discretionary power suspend proceedings upon an application for patent pending the determination of such a suit, it should not ordinarily exercise this power unless an adjudication by the court of the questions involved in the suit would aid in the disposal of a protest filed in the department against the application. *Selma Oil Co.*, 33 L. D. 187 (1904).

So long as suit on the adverse claim appears to be pending, the proceedings in the department are stayed. No inquiry will be made by the department as to whether there has been reasonable diligence in prosecuting the suit. That is a question to be determined by the court. It makes no difference that the question is raised by one who is not a party to the suit. *Davis v. McDonald*, 33 L. D. 641 (1905).

An adverse claim by a Colorado corporation sworn to by its president in Kentucky is not properly verified under Rev. St. 2325, or the act of April 26, 1882. "Treated as the oath of the corporation, it is not within the act of 1882, because at the time the oath was made, the corporation was not residing, nor did it have its being, in the State of Kentucky. Treated as the oath of the president, as agent of the corporation, it cannot be accepted, because not made within the land district where the claims are situated." *Louisville Gold Min. Co. v. Hayman Min. & Tunnel Co.*, 33 L. D. 680 (1905).

The judgment referred to in *Clipper Min. Co. v. Searl*, above, having been affirmed (in *Clipper Min. Co. v. Eli Min. & Land Co.*, 194 U. S. 220, 48 Law. Ed. 944, see page 445, supra), it was held by the land office that the judgment of the court under Rev. St. 2326 goes only to the question of the right of possession as between the parties, and it remains for the department to determine all other questions touching the right to patent. The adverse claimants having prevailed in the suit solely on the strength of their placer location, they can take title to the lodes under the judgment roll only by virtue of their right to a placer patent. They could take them, if at all, only as lodes within a placer. Unless their claim is of patentable placer character, the lodes are not in that situation and are therefore not available to the placer claimants.

On the other hand, if the land is found to be "non-placer in the patentable sense," the basis of the claim of the placer claimant to the lodes disappears, no prejudice to the claim of the lode applicant can have resulted from the judgment, and no obstruction to the completion of his proceedings for patent would then remain. A hearing was accordingly ordered to determine whether the ground was placer, at the date of the lode application. *Clipper Min. Co. v. Eli Min. & Land Co.*, 33 L. D. 660 (1905); *Id.*, on review, 34 L. D. 401 (1906).

The adverse claim must be filed within the period of publication. If the sixtieth day falls on Sunday, it may not be filed on the following day. The department has no authority to extend the period of publication. *Holman v. Central Montana Mines Co.*, 34 L. D. 568 (1906), overruling *Ground Hog Lode v. Parole & Morning Star Lodes*, 8 L. D. 430 (see vol. 1, p. 412).

A final judgment under the amendatory act of March 3, 1881, that neither party is entitled to the right of possession or should take anything by the action, is a conclusive determination that under the patent proceedings out of which the controversy arose neither party is entitled to a patent and that those proceedings were therefore without effect from the beginning. The last clause of that act does not justify the conclusion that "in the event of a judgment in accordance with the act, the applicant for patent may thereupon go forward, independently of the judgment, to complete the patent proceedings theretofore initiated by him and 'without giving further notice' upon having 'perfected his title.'" "The act provides for a judgment adverse to both parties, effectually terminating the patent proceedings, and leaving no question to be determined by the land department." *Brien v. Moffitt*, 35 L. D. 32 (1906), overruling *James D. Rankin*, 7 L. D. 411.

Where an adverse claim is presented for filing within the period fixed by statute but is rejected by the local officers, an appeal from that action does not relieve the adverse claimant from the obligation to commence judicial proceedings within the statutory period, and a failure to do so constitutes a waiver of his claim. *Deniss v. Sinnott*, 35 L. D. 304 (1906).

Rev. St. 2325 and 2326 contemplate as the subject of judicial determination the disputed possessory right to ground embraced in conflicts between different mining claims only. An adverse claim by a railroad company claiming the land as right of way and for station purposes will not be entertained. It may, however, be treated as a protest which raises the question of the character of the land, of expenditures for improvements, and of the sufficiency of notice, which are within the jurisdiction of the department. *Grand Canyon R. Co. v. Cameron*, 35 L. D. 495 (1907).

The provision of the statute that judicial proceedings must be commenced within thirty days is mandatory. The time cannot be enlarged by the department. *Madison Placer Claim*, 35 L. D. 551 (1907).

A mill site claimant is not required to file an adverse claim in order to protect his rights as against an applicant for patent to a mining claim. A mill site, which must be nonmineral, is consequently not claimed for valuable deposits of mineral. Such a claimant may, however, file a protest

and thereby litigate all material matters relating to the validity and ownership of his claim as against the mineral applicant. *Helena & L. Smelting & Reduction Co. v. Dailey*, 36 L. D. 144 (1907). (This overrules *Warren Mill Site v. Copper Prince*, 1 L. D. 555, vol. 1, p. 406.)

An adverse claim having been filed on Jan. 27, the clerk of the court on Feb. 26 received by mail from the claimant's attorney a complaint and a letter requesting that it be filed and a summons issued thereon. On March 2 the complaint was marked filed and a summons issued. On April 3 the court ordered that the complaint be filed and summons issued as of Feb. 26. The department refused to review the validity of this order; "it clearly does not lie within the province of the land department to say at this time that the institution of the pending suit was not a proceeding commenced in time within the purview of the federal statute." *Gypsum Placer Claims*, 37 L. D. 484 (1909).

If one of a number of cotenants brings a mining claim before the land department by application for patent and the local officers assume jurisdiction and authorize notice thereof in the manner prescribed by the statute, the claimant under a rival location should adverse or he will be held to have waived his claim. "If the interests of pretermitted co-owners are disclosed by the record, the adverse claimant and plaintiff should make them parties defendant to his suit in the court. On the other hand, if the omission of such parties in interest in the prosecution of the patent proceedings results in a corresponding nonjoinder of parties in the adverse suit, it will devolve upon the defendant or defendants to raise the question by plea in abatement or otherwise as may be appropriate under the practice and procedure of the particular jurisdiction, and thus afford the plaintiff whatever remedy in that behalf he may be entitled to enjoy. But if the adverse claimant, instead of proceeding in the courts, elects to take the attitude of a protestant before the land department and merely call to the attention of the latter the defective title of the applicants, he comes into that jurisdiction in the position of *amicus curiae* only; not by right, but by grace. As thus presented to the land department, the case is to all intents and purposes *ex parte* in character, subject to consideration and disposition as such." *E. J. Ritter*, 37 L. D. 715 (1909).

The supreme court of Colorado (see *Healey v. Rupp*, 37 Colo. 25, 86 Pac. 1015, above) having decided that the adverse claimant had no standing, because his claim was based upon a discovery made subsequent to the time of filing his adverse claim, he, therefore, dismissed the adverse suit and filed a protest, alleging that the applicant had never discovered mineral within the boundaries of his claim. It was decided that he should be heard on these allegations, for if it was true that there was not any discovery, the application should be dismissed and the applicant remitted to the prosecution of patent proceedings anew. While the question of discovery is one not ordinarily presented before the land department, yet, under certain conditions, it may be fully investigated and determined. A patent should not be allowed unless a seasonable and valid discovery be shown. *Rupp v. Heirs of Healey*, 38 L. D. 387 (1910).

III. EFFECT OF THE PATENT.

p. 415. The patent of the government passes to the patentee an absolute title in fee simple. When that title has passed, its holder may use the land for whatever purpose he may choose. It is his to do with as he pleases. The right of possession under location before entry for patent is conditioned upon the working of the land as mining land. But the title of the patentee is unconditional. He may develop the mines, if he so chooses, or he may use the land for other different purposes, as, for instance, agriculture, or town lots.

The title of the patentee will be controlled by the courts by the enforcement of a trust not only in cases where a fiduciary relation exists, but also where under any circumstances a trust will be implied in equity. It follows that while a patent may not be collaterally assailed on the ground of fraud, the complainant may set up fraud of the patentee in connection with the proceedings for patent to establish a trust *ex maleficio*.

While as a general rule the patent takes effect by relation to the date of completed location (see, however, *Hickey v. Anaconda C. M. Co.*, 33 Mont. 46, 81 Pac. 806, below), yet the doctrine of relation, being an equitable fiction, will not be applied where it will have an inequitable result, or will relieve the patentee of the consequences of his own illegal act.

United States.

New Dunderberg Min. Co. v. Old, 25 C. C. A. 116, 79 Fed. 598 (1897). 8th Cir. "A patent to land or mineral lodes, over which the land department of the United States has the power of disposition and the jurisdiction to determine the claims of applicants for, under the acts of Congress, is impregnable to collateral attack, whether the decision of the department on which it is based was right or wrong, and the patent conveys the legal title to the property to the patentee." "A patent issued under and in accordance with the provisions of the act of May 10, 1872, to a mining claim located before the passage of that act, conveys the legal title to every vein or lode of mineral whose apex is within its surface lines extended downward vertically, and is not subject to collateral attack in an action at law, either on the ground that there was a claim adverse to that patent when the act of 1872 was passed, or on the ground that adverse rights were affected by its issue under the provisions of that act." The determination of these questions was within the jurisdiction of the land department.

"A claimant who discovered and located a lode mining claim under the act of 1866 renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claims, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the act of May 10, 1872." The provision of § 9 of the act of 1872 (Rev. St. 2328), that the repeal of the act of 1866 shall not affect existing rights, does not avail him. It was not the repeal of that act which affected his rights, but his own act in taking the benefit of the provisions of the act of 1872 and thereby renouncing his rights under the former act.

Golden Reward Min. Co. v. Burton Min. Co., 79 Fed. 868 (1897). C. C. D. S. D. Complainant and defendant owned claims which conflicted, the latter holding under the prior location. Defendant made application for a patent upon a survey which so changed the lines of the claim as to make the ground in conflict much larger. No adverse claim was filed by the complainant, which subsequently made application for patent to its claim, wherein it excluded the ground in conflict as claimed in defendant's application. Both patents were issued. In prosecuting their applications both parties were represented by the same attorney. The complainant sought to confine the defendant to the lines of the original location and to recover the ground covered by the complainant's patent, but not included in the original location, on the ground that it had been prevented from filing an adverse claim by the fraudulent acts of the defendant and the attorney who had confederated for the purpose of suppressing the truth as to the amount of ground included in the conflict. The evidence did not establish this allegation.

"With reference to the proceedings in the land office, the publication of the proper notice for the prescribed period is due process of law. The proceeding is judicial in its character and in the nature of a proceeding in rem. If there is no adverse claim, a decision of the land office awarding the patent to the claimant is a judgment by default, as conclusive as to the matter adjudicated as a judgment upon contested issues. The expression 'it shall be assumed' must be construed to mean 'conclusively assumed' as any other construction would defeat the object of the statute. In using the word 'conclusively' I do not mean to say that the statute has closed the doors of a court of equity to adverse claimants in every case; but I do think it may safely be asserted that the failure to adverse, as provided by the sections referred to, deprives the adverse claimant of all remedies except those which a court of equity might allow to be urged against a judgment at law."

"Laying aside the question of fraud, as limited and defined in the cases cited, it is settled that the action of the land department in issuing a patent is conclusive upon all questions of fact coming properly within the scope of its jurisdiction, and is not subject to review by any other tribunal. The question as to what were the true boundaries of the Bonanza and Silver case was a question of fact, coming properly within the jurisdiction of the land department."

Durango Land & Coal Co. v. Evans, 25 C. C. A. 523, 80 Fed. 425 (1897). 8th Circ. The unsuccessful party to a contest in the land office, upon conflicting claims to coal lands, brought a bill in equity against the contestant to whom the patent was issued to establish a trust. "Viewed in this aspect, the case at bar is one in which the complainant seeks to set aside and impeach the judgment of the land department; and the doctrine is too well settled to admit of any controversy that the decisions of that tribunal upon questions properly pending before it can only be annulled when such fraud or imposition is shown to have been practiced as prevented the unsuccessful party in a contest from fully presenting his case or the officers composing the tribunal from fully considering it, or when such officers have themselves been guilty of fraudulent conduct, or when it is made to appear that, upon the case as established before the land department, the law applicable thereto was misconstrued or misapplied. If fraud is charged as a ground for annulling a decision of the land department, it is not enough that false testimony or forged documents have been employed; but it must be made to appear that such false testimony has affected the decision and led to a result which otherwise would not have been reached. And inasmuch as the findings of the land department on questions of fact are conclusive, when the charge is that the land department has erred in the decision of a mixed question of law and fact, what the facts were, as laid before and found by the department, must be shown, so as to enable the court to see clearly that the law has been misconstrued." "Turning, then, to the allegations of the bill which attempt to show that the decision of the land department was procured by fraud and imposition, it will be observed that the only fraudulent acts alleged are that certain affidavits were filed in the land office by Evans and his associates, alleging that Evans had expended money in developing coal mines on the land in controversy; that he was in actual possession of the lands at the time; that he made his alleged entry for his own use; and that all of such statements contained in the affidavits were false. Aside from a general allegation of conspiracy among the defendants to fraudulently and unlawfully obtain a patent for the lands in dispute, the foregoing are the only specific fraudulent acts which the bill charges or describes; but, obviously, the issues tendered by these affidavits were the very issues which the land department was appointed to try and determine and they were each issues of fact, concerning which the finding of the land department is final and conclusive, unless such finding was induced by fraud. In the contest pending before the department, the complainant company had an opportunity to show, as it now contends, that all the aforesaid statements were false; and, within the doctrine above stated, it was its duty to have made such showing before the land department, and it will not be excused for failing to do so unless it alleges and proves that some trick, artifice or deceit was practiced which prevented it from obtaining a full and fair trial of the issues, or which prevented the officers of the land department from considering the same, and reaching a proper decision. It must be apparent, we think, from a careful reading of the complaint, that no such fraud is

alleged and that, if the circuit court had entered upon a hearing of the issues presented by the bill, it would simply have retried the very case which was tried by the land department." "This court cannot say that the law was misconstrued by the officers of the land department, unless their findings upon questions of fact are disclosed, or enough undisputed facts are disclosed, which were proven before the department to make it plain that an error of law was committed and that the complainant company was thereby deprived of its rights."

Evans v. Durango Land & Coal Co., 25 C. C. A. 531, 80 Fed. 433 (1897). 8th Circ. "It may be conceded that a patent for public land has, on several occasions, been held to take effect as of the date of the initial step taken by the patentee, under the laws of the United States, to obtain a title to the land. * * * Nevertheless, there appears to be no hard and fast rule giving a patent effect by relation as of a date anterior to the time when an entry is fully consummated by the payment of the purchase money, or by the doing of some other equivalent act, such as the surrender of a land warrant or the selection of land to supply an ascertained deficiency in a land grant. It is generally agreed that, when such acts are performed, the equitable title becomes complete, subject, of course, to the right of the land department to cancel the entry, or the selection, prior to the issuance of the patent, for good and sufficient cause shown, why the entry or selection should not have been allowed. The doctrine of relation is a legal fiction, which was invented and is applied solely for the protection of persons who, without fault of their own, would otherwise sustain an injury. Being of equitable origin and designed to prevent fraud and injustice, it is a doctrine which is never applied when it would have a contrary effect.

* * * The plaintiffs found their right to recover for coal mined and removed prior to December 31, 1894, on the allegation that Evans filed a coal declaratory statement on October 2, 1880. The filing of this statement, assuming the facts stated therein to be true, gave Evans, in the language of the statute, 'a preference right of entry,' nothing more and nothing less. Section 2348, Rev. St. U. S. Manifestly, it did not create such a complete equitable title as is acquired when public land is entered and paid for. To have made his equitable title complete, Evans should have proved his rights and paid for the land within one year after October 2, 1880. In default of so doing the statute (section 2350 Rev. St. U. S.) declared that the land filed against should be subject to entry by 'any other qualified applicant.' The complaint shows affirmatively that this was not done; that no payment was made by Evans until December 31, 1894; and that, after the year limited for making payment had expired, Byron McMaster was permitted by the officers of the land department to enter the land, on the theory, no doubt, that Evans' preference right of entry had been forfeited. The only reason stated in the complaint why the entry of McMaster was eventually canceled by the officers of the land department is that they found and decided that the entry was not made for his own benefit, but presumably for the benefit of the Durango Land & Coal Company. It is not alleged in the complaint that the McMaster entry

was canceled because the plaintiff Evans had previously filed a declaratory statement and obtained a preference right of entry or that such preference right of entry in the judgment of the land department in any manner affected the validity of the McMaster entry. We must presume, therefore, that, but for the fact that McMaster did not enter the land for his own benefit, such entry would have prevailed over the preference right of entry originally secured by Evans, and that the land would have been patented to the defendant, on the ground that such preference right had either been lost or abandoned. In this aspect of the case, it follows that Evans' right to the land had its origin in the cash entry which he was allowed to make on December 31, 1894, after the McMaster entry was canceled, and that his patent ought not to be given effect by relation as of an earlier date, because whatever right he had theretofore acquired had been lost. * * * It may be that facts can be shown which will excuse Evans' apparent want of diligence in perfecting his title, but we are constrained to hold that the present complaint does not contain such a showing, nor any averments which would justify us in holding that his patent should be given effect by relation as of a date anterior to December 31, 1894."

Waterloo Min. Co. v. Doe, 27 C. C. A. 50, 82 Fed. 45 (1897). 9th Circ. When the description in a patent gives it parallel end lines and grants the right to follow all lodes on their dip outside of the side lines, whose apex is within the surface lines and whose strike is cut by the end lines extended perpendicularly downward, the patentee's extralateral rights cannot be questioned in a collateral proceeding on the ground that the end lines as located were not parallel. "The presumptions are in favor of the correctness of the land department in issuing this patent. Its action was within its jurisdiction and we cannot go behind the same in a collateral action. Looking then, at the patent, we observe that appellant was granted extralateral rights."

Perigo v. Erwin, 85 Fed. 904 (1898). C. C. D. Utah. The patent destroys the effect of a prior discovery made within the lines of the patented claim. A location on adjoining land cannot be based thereon.

Schwab v. Beam, 86 Fed. 41 (1898). C. C. D. Colo. Where a patent has been issued to a prior locator for a placer claim, he may restrain the use of water by a subsequent locator higher up stream, where such use interferes with his own though he has ceased to use the property for mining purposes and expects to turn his claim into a mill site. "There can be no abandonment of the water as distinguished from the land, nor of the land as distinguished from the water. Each is without value when separated from the other, and therefore they cannot be legally divorced. It is said, however, that complainant, having found the business of mining to be unprofitable, no longer intends to work his claims, and now holds them for sale as a mill site, or as a site for an electric power plant or some manufacturing establishment. Be it so; the government has issued patents for the claims, and the title of complainant is now absolute for any purpose to which they may be put. A patent for agricultural land does not limit

the use of the patentee to tilling the soil which may be conveyed by the patent. No more is a patent for mineral land, whether lode or placer, restrictive of the use of the territory which may be conveyed."

Cates v. Producers & Consumers Oil Co., 96 Fed. 7 (1899). C. C. S. D. Cal. A bill in equity alleging that a patent for a mining claim was obtained by the defendants fraudulently, illegally and without authority or jurisdiction of the officers of the United States, and that the claim belonged to the plaintiff, and praying that the defendants be decreed to hold the title in trust for the plaintiff and to convey it to him, necessarily presents a federal question of which this court has jurisdiction. Whether the patent is valid or invalid, and whether if valid it should be conveyed to plaintiff, depends upon the proper application of the laws of the United States to the facts.

Duluth & Iron Range R. Co. v. Roy, 173 U. S. 587, 43 Law. Ed. 829 (1899). When a patent is obtained by fraud, mistake or imposition, to the injury of a person who had previously initiated the steps required by law to obtain possession and ownership of the land, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will divest or control the title, thereby acquired, either by compelling a conveyance to the plaintiff, or by quieting his title as against the defendants and enjoining them from asserting theirs.

The plaintiff must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim to a patent.

Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 182 U. S. 499, 45 Law. Ed. 1200 (1901). Patent relates back to date of location and is conclusive of discovery. Testimony of nondiscovery will not be admitted as against a patent which cannot be collaterally attacked.

Peabody Gold Min. Co. v. Gold Hill Min. Co., 49 C. C. A. 637, 111 Fed. 817 (1901), 9th Circ., affirming 97 Fed. 657. (Qualifies *Lakin v. Roberts*, 54 Fed. 461, vol. 1, p. 425. See chap. VIII, div. 1, page 325, above.)

The fact that a patent includes ground extending more than 300 feet on each side of the lode does not render it invalid as to the excess. A single patent may include a number of claims; it is conclusive as to boundary lines, and may not be collaterally attacked.

Thallmann v. Thomas, 49 C. C. A. 317, 111 Fed. 277 (1901), 8th Circ., affirming 102 Fed. 935 (1900). Equity will not entertain a bill to correct the calls in a patent to a mining claim so as to make them conform to monuments alleged to have been located on the ground, where the alleged monuments were not in place for about 16 or 18 years prior to the filing of the bill and there is so much doubt as to where the monuments were first located that the court would first have to establish such location and then give it effect to control what is expressed in the patent. "Patents, contracts and conveyances, the accredited evidences of rights and titles, may not be set aside or modified for mistakes, unless these mistakes are established by evidence that is plain and convincing beyond reasonable controversy. Such evidences of the rights of parties bear with them a strong presumption of their correctness. * * * No mere preponderance

of evidence, no loose, uncertain, conjectural proof ought to be permitted to strike down or change the nature or the extent of these solemn grants of the nation. Nothing should be permitted to reach that result but evidence so clear, unequivocal and convincing that it does not leave the issue in doubt."

Teller v. United States, 51 C. C. A. 230, 113 Fed. 273 (1901). 8th Cir. "The two titles recognized by the United States confer totally different rights. The first one confers a right (and it may properly enough be said to be vested in the locator) to the possession of the land for the purpose of carrying on his mining operations as long as he performs the required conditions. This, however, he may at any time abandon by ceasing to perform the conditions upon which it depends. The second is a complete and absolute title which may or may not be acquired by the locator, and, if acquired, is for other and valuable considerations moving from him to the United States. This title is dependent upon no conditions but confers all the rights incident to an indefeasible estate in fee simple. Considerations like the foregoing conclusively show that there is no warrant for the contention that the locator's right of possession segregates the land from the public domain and appropriates it to a private purpose in any such way as to withdraw it from the effect of the provisions of the criminal statutes under which the defendant was convicted. After the locator shall have applied for a patent, * * * and after he shall have perfected his entry upon the land by the payment of the purchase price, and not till then, has the land ceased to be a part of the public domain, and not till then has he acquired any vested right to the absolute title. * * * When such an entry is made, the land is not only withdrawn from the public domain, but the entryman has acquired an equitable title, and thereafter, and not till then, the United States holds the legal title in trust for him." The right conferred by final entry does not relate to the date of the application in any such sense as to relieve the applicant from the operation of the statutes against the cutting of timber. See this case also under chap. XIX, div. III.

Empire State-Idaho Min. & Developing Co. v. Bunker Hill & Sullivan Min. & Concentrating Co., 52 C. C. A. 222, 114 Fed. 420 (1902), modifying *Bunker Hill & S. M. & C. Co. v. Empire State-Idaho M. & D. Co.*, 109 Fed. 538 (1901). 9th Cir. An application for a patent necessarily carries with it an implied allegation that the land claimed is unappropriated. The statutes provide for the publication of this application, and a failure to contest the application constitutes an admission of the truth of every fact covered by it. Hence the issuance of a patent, where all legal requirements have been complied with, in the absence of any adverse claim, is absolutely conclusive, as against every one whose surface lines conflicted therewith, of the patentee's priority of location over every other and confers on the patentee not only the entire surface of the claim, but the extralateral rights conferred by Rev. St. 2322, as against every one whose surface lines conflicted therewith. But it does not in any way adjudicate conflicts in respect to extralateral rights growing out of loca-

tions whose surfaces do not conflict. In such cases there would be no ground for an adverse claim. They are, therefore, beyond the purview of the proceedings in the land department and solely for the determination of the courts when brought before them.

Aclison v. Champagne Min. & Mill. Co., 55 C. C. A. 576, 119 Fed. 123 (1902), 8th Circ., affirming 111 Fed. 655. A bill in equity to have the patentee of a mining claim declared a trustee of the claim for plaintiff will be dismissed where it appears that the plaintiff did not adverse defendant's application, and filed a protest only after the defendant had paid the purchase price and received a certificate of entry. The certificate of entry invests the purchaser with full equitable title to the land and is equivalent to a patent so far as the acquisition of title after that by a third person goes. The plaintiff claimed no right at all in the claim before the defendant had obtained his certificate of entry, and after that it was too late for him to initiate or acquire any. After entry in the land office a relocation of the premises cannot be made by another party so long as that entry stands. The only remedy for the party wishing to show that the original location was void and fraudulent is to induce the government to proceed towards setting aside the entry. The courts will not entertain a suit by the relocater against the original locator to enforce the conveyance to him of the claim. The plaintiff had unsuccessfully sought to have the entry set aside by the land department. That ruling was not subject to review in the courts.

Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 64 C. C. A. 180, 129 Fed. 668 (1904). 8th Circ. In this case the court applied to a description in a patent for a mining claim the following rules of construction of conveyances:

In cases of conflicts between monuments called in a conveyance and the courses and distances there noted, the former, if standing in their original positions, prevail.

If monuments called have been lost or removed, the places where they were originally set may be shown by parol or documentary evidence, and, if proved to the satisfaction of the jury by a fair preponderance of testimony they prevail over the courses and distances.

If the monuments called have been lost or removed, and their original locations are not proved, the courses and distances control the description, and must be followed in its application to the land.

Parol evidence is incompetent to substitute in a conveyance a call for another monument in the place of the call for the original monument there contained.

A round stake four inches in diameter, set loosely six inches in the ground between two convenient reference points within four feet of it, with two blazes upon it, and an inscription with a lead pencil of the figures "3-2309" upon the later blaze, does not fill the description of a post four inches square, with the figures "3-2309" cut into it, set firmly in the ground, where no reference points are available.

Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co., 66 C. C. A. 299, 131 Fed. 579 (1904). 9th Circ. The issuance by the government

of its patent to a mining claim is conclusive evidence of the sufficiency of the steps taken by the locator to perfect a valid location.

Creede & Cripple Creek Min. & M. Co. v. Uinta Tunnel M. & Transp. Co., 196 U. S. 337, 49 Law. Ed. 501 (1905). "The patent is the instrument by which the fee simple title to the mining claim is granted." Its issue is not only a conclusive adjudication of the fact of the discovery, but also of the compliance with the essentials of location including the requirements of the state statutes. But it does not determine the order of proceedings prior to entry. See this case also on page 268.

Brown v. Gurney, 201 U. S. 184, 50 Law. Ed. 717 (1905), affirming *Gurney v. Brown*, 32 Colo. 472, 77 Pac. 357. Rulings of the land department as to what ground is covered by location are conclusive on the courts. The principle of the freedom of such decisions from collateral attack is applicable not only where a patent has issued, but where final entry has been made. "The final certificate issued by the receiver after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be for many purposes the equivalent of a patent."

Stewart v. Westlake, 78 C. C. A. 341, 148 Fed. 349 (1906). 8th Circ. "A lessee of a mining claim who has contracted to do an amount of work thereon which would be a sufficient compliance with the legal requirements in respect of development, and also to notify the lessor of any intention to surrender or abandon the lease, cannot upon failing to perform his obligations secretly relocate the claim, and so secure and hold for himself the title. A patent obtained under such circumstances will be decreed to be held in trust for the lessor." The result is not affected by the fact that title was taken, not by the lessee, but by another for his benefit.

Lawson v. United States Min. Co., 207 U. S. 1, 52 Law. Ed. 65 (1907), affirming *United States Min. Co. v. Lawson*, 67 C. C. A. 587, 134 Fed. 769. (See this case on page 380, supra.) Where the apex of a single broad vein is longitudinally bisected by a common side line of two claims, the relative rights of the owners of the claim are based upon priority of location and not priority of entry and patent. "There is no record of any adverse suits, although it is intimated that there were such suits. In the absence of record thereof we cannot assume that anything more was presented and decided than was necessary to justify the patents. A patent is issued for the land described and all that is necessarily determined in an adverse suit is the priority of right to the land."

"Without determining what would be the effect of a judgment in an adverse suit in respect to subterranean rights, if any were in fact presented and adjudicated, it is enough now to hold that there is no presumption, in the absence of the record, that any such rights were considered and determined. Indeed, in the absence of a record, or some satisfactory evidence, it is to be assumed that the patents were issued without any contest and upon the surveys made under the direction of the United States surveyor general, and included only ground in respect to which there was no conflict. If the surface ground included in an application does not

conflict with that of an adjoining claimant, the latter is in no position to question the right of the former to a patent. Take the not infrequent case of two claims adjoining each other, the boundary line between which is undisputed. If the owner of one applies for a patent, the owner of the other is clearly under no obligation to adverse that application, even if under any circumstances he might have a right to do so. Other necessary conditions being proved, the applicant is entitled to a patent for the ground. Generally speaking, if the boundary between the two claims is undisputed, the foundation for an adverse suit is lacking. While a patent is evidence of the patentee's priority of right to the ground described, it is not evidence that that right was initiated prior to the right of the patentee of adjoining tract to the ground within his claim."

Acceptance by the government of location proceedings had before the statute of 1866, and the issue of a patent thereon, are conclusive evidence that those proceedings were in accordance with the rules and customs of the local mining district. See this case also on page 507.

Nowell v. McBride, 162 Fed. 432 (1908). 9th Circ. The right of a purchaser of mining claims to specific performance of the contract of sale is not defeated by the fact that the seller, after entering into the contract, applied for and obtained a patent and the buyer did not file an adverse claim thereto. The seller was trustee for the buyer and held the patent in trust for him. The latter did not claim adversely to the patent but under it.

Van Sice v. Ibez Min. Co., 173 Fed. 895 (1909). 8th Circ. It is common practice to obtain patents in the names of the original locators or entrymen without regard to intervening changes in right or ownership. The grantee of some of such locators is not thereby estopped from alleging the forfeiture of the interest of the others. See this case also on page 337.

Alaska.

Alaska Gold Min. Co. v. Barbridge, 1 Alaska, 311 (1901). A patent for a mining claim is conclusive as to the limits of the location, and it cannot be assailed by showing that the actual boundaries are different from those described in the patent.

Fox v. Mackay, 1 Alaska, 329 (1901). A patent issued for a mining claim is conclusive as to priority of right, the discovery of mineral in place, and that thereafter the claim had been properly located and marked so that its boundaries might be readily traced.

California.

Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901 (1904). The facts of the proper location of a mining claim, the marking of its boundaries upon the ground, the recording of the location notice, the discovery of mineral within the limits of the claim, etc., are all conclusively proved by the issuance of a patent for the claim. So, too, where a patent is issued to a

corporation, it establishes the fact that the patentee was a corporation at the time of the issuance of the patent. See this case also on page 373.

Colorado.

Fisher v. Seymour, 23 Colo. 542, 49 Pac. 30 (1897). F. was the owner of the American Flag claim. S. was her agent for the sale of the same. Being such agent and having an interest in the Little Tiger Claim, which conflicted with the American Flag, he relocated the former as the Tiger, so changing the lines as to include the greater part of the American Flag and obtained a patent for the Tiger in the name of himself and others. He did not communicate these facts to F., who was absent from the state and whom he lulled into fancied security by correspondence on the subject of her property. She had no actual knowledge of the proceedings for patent. The court, having found that the American Flag was the senior location, held that S. had committed a fraud upon F., and he was declared to hold in trust for her to the extent of his interest.

"The law requires the utmost good faith on the part of an agent when dealing with his principal and it is well settled that an agent to sell cannot purchase the property for himself, unless he makes known to his principal that he is such purchaser, and acquaints him with all the facts." "If he could not purchase, he certainly could not 'jump' the property, and thereby deprive Mrs F. and her children of the property."

Argonaut Con. Min. & Mill. Co. v. Turner, 23 Colo. 400, 48 Pac. 685, 58 Am. St. Rep. 245 (1897). Plaintiff brought trespass against defendant for mining on the dip of a vein which had its apex in plaintiff's patented claim. By way of defense it was set up that the vein upon which the location was based passed out of the claim across a side line, and that consequently the location was void as to the ground beyond the point of departure. It was in this part of the claim that the vein in dispute was situated.

Held that, although this contention might be good as to an unpatented claim under *Armstrong v. Lower*, 6 Colo. 393, it could not defeat title to ground for which a patent had issued. The patent was conclusive of the patentee's title to the ground and veins having their apexes therein. A demurrer to this defense was sustained.

Mills v. Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241 (1898). A purchase by a cotenant of a mining claim of a title initiated by a relocation of the same ground inures to the benefit of his co-owners, for whom he will be held to be a trustee, as will also a purchaser from him with notice. The issuance of a patent to the latter was not conclusive of the rights of the parties. Under *Turner v. Sawyer*, 150 U. S. 578, 37 Law. Ed. 1189, the patentee would hold as trustee for the co-owners.

Malaby v. Rice, 15 Colo. App. 364, 62 Pac. 228 (1900). By the terms of a lease of a mining claim from plaintiffs to defendant, the latter undertook to work the mine on a royalty and to do a certain amount of assessment work on the claim each year that he held possession. The defendant, after taking

possession, claimed that the plaintiffs should pay him a certain part of the cost of doing this assessment work under penalty of the forfeiture of their interest in the claim, and, upon their refusal to do so, he filed a pretended notice of such forfeiture and, claiming to be the sole owner of the claim, applied to the land office for a patent and procured a receiver's receipt for the purchase price of said claim. The plaintiffs brought a bill in equity to have the defendant declared a trustee of the claim for them, and compelled to convey it to them. Held that a court of equity had jurisdiction of such a bill, that the matter in controversy could not be adjudicated by the land office, and that the plaintiffs could bring such a bill without waiting until a patent for the claim had been issued by the government. The issuance by the land office of the receiver's receipt for the purchase price of a claim is an acknowledgment, so far as all other parties save the government are concerned, that the government has parted with its interest in the land. After its issuance, the parties to whom the receipt runs are vested with a title which they can convey, subject to be defeated only by the government.

Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57 (1903). In an action of ejectment for a patented mining claim, the question cannot be raised by the defendant as to whether the plaintiff's lode carried precious metals in appreciable quantities; after a patent has once been granted, this question cannot be raised collaterally.

Quinn v. Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552 (1904). Where one by the decision of the secretary of the interior is permitted to amend his entry, such amendment to take effect as of the date of entry, the patent finally issued to him relates back to the date of the original entry, and he was, therefore, by the doctrine of relation, the legal and equitable owner of the land from such date. The patent cannot be collaterally attacked.

Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925 (1904). Where two mining claims overlap on the surface, and the locator of one of them applies for and receives a patent without any adverse claim being filed by the other, the latter is as much concluded by the issuance of the patent as if he had filed an adverse claim and brought an action in support of it and the judgment in such action had been against him. See this case also on page 514.

Ballard v. Golob, 34 Colo. 417, 83 Pac. 376 (1905); *Stephens v. Golob*, 34 Colo. 429, 83 Pac. 381 (1905). Where certain co-owners of a claim procure a patent to the exclusion of another co-owner and then convey to a third party having knowledge of the facts, the grantee holds as trustee for the excluded co-owners. Neither the patentees nor their grantee can defeat his rights.

Montana.

Butte & Boston Min. Co. v. Sloan, 16 Mont. 97, 40 Pac. 217 (1895). In an action of ejectment for a mining claim, where the plaintiffs claimed

under placer patents, the introduction of the patents in evidence conclusively established, as against the defendants, that the ground was placer.

Murray v. Montana Lumber & Mfg. Co., 25 Mont. 14, 63 Pac. 719 (1901). N. having applied for patent, paid the purchase money and received a certificate in 1886. In 1888 he conveyed to F., who in 1889 conveyed to defendant. M. applied for patent in 1887, and proceeded to entry which was canceled by the department because it conflicted with N.'s entry. In 1890 M. filed a relinquishment of the ground in conflict by C. & W., who claimed under deed from F. dated July 8, 1890, and thereupon patent was issued to M. M. brought ejectment against the defendant, for whom judgment was entered. "Whenever one person wrongfully obtains title to land which in equity and good conscience belongs to another, whether it be done in good faith or not, he is properly chargeable as trustee for the benefit of such other person. The principle applies to proceedings by which patent is obtained from the United States as well as to dealings between private individuals; and the courts have readily exercised their equitable powers to control and limit the operation of the patent as between adverse claimants whenever it has been made to appear that by a mistaken application of the law to the facts of the case by the officers of the land department the patent has been issued to the wrong person, or when the holder of the legal title under it has obtained it by a fraud upon the rights of one who is entitled to it. The party claiming to be the rightful owner must show, of course, that he stood in such a relation to the government at the time the patent was issued that he was entitled to demand it; but, when this has been made to appear, the mere fact that the patent has been issued to another in no way impairs his right to be declared the owner."

It was not necessary to show that N. had successfully prosecuted adverse proceedings against M.'s application. The certificate of purchase issued to N. was evidence that he had complied with all conditions prescribed by the law and had acquired a vested interest in the land. "The public faith was thus pledged to them, as well as their grantees, and thereafter the officers of the land department had no right to convey to any one else so long as the certificate was outstanding."

Hickey v. Anaconda Copper Min. Co., 33 Mont. 46, 81 Pac. 806 (1905). A patent is not conclusive of the fact that a declaratory statement in due form of law was filed for record. "When a patentee seeks to show that his title is older than the evidence of his title indicates—when he seeks to show that, notwithstanding the date of his patent or receiver's final receipt, his title in fact relates back to the date of his location, he must show affirmatively a location valid under the laws of the state where the claim is situated." "The doctrine of relation is a fiction of law, and whether a patent relates to the date of location is to be determined by the facts of each particular case. It may be conceded that the patent is conclusive that everything has been done which the federal statutes require shall be done as condition precedent to patent, but we cannot believe that it is conclusive of matters with respect to which the government issuing the patent

has not any concern." Where a declaratory statement is void because of insufficient verification, a patent does not by relation give validity to the location as of a date antecedent to the application for patent.

Delmoe v. Long, 35 Mont. 139, 88 Pac. 778 (1907). One of two cotenants, having taken proceedings under Rev. St. 2324 for the forfeiture of his cotenant's interest, applied for and received patent in his own name for the claim. It being shown that no assessment work at all had been done by him, the proceedings to forfeit his cotenant's interest were, therefore, void. The patent was not conclusive of his title and he consequently held to the extent of one-half for the benefit of his co-owner.

Collins v. McKay, 36 Mont. 123, 92 Pac. 295, 122 Am. St. Rep. 334 (1907). The locator of a placer claim subsequently located a lode claim so as to conflict with his placer. He then by deed conveyed a portion of the lode claim, so describing it, to the defendant's grantor. Subsequently, he obtained a patent for the placer and his administrator brought this suit to quiet title. The court found for the defendant. It makes no difference whether the lode location was valid as against others or not. The name "Providence Lode Claim" simply identifies the property intended to be conveyed, and the grantor is presumed by his deed to have intended to pass the best title which he had to the ground by virtue of Civ. Code, § 1511. This title the deed did pass, and also his farther acquired title to the ground. Civ. Code, § 1512.

Oregon.

Rader v. Allen, 27 Or. 344, 41 Pac. 154 (1895). One who has paid purchase money to the government and received a "patent certificate" has an interest which is a legal estate in land which can be recovered in ejectment. The land then ceases to be a part of the public domain, and is not subject to the limitation of Hills' Ann. Laws, § 2178, that one year's adverse possession of a mine is a bar to an action for its possession.

A statement in the complaint that plaintiff is the owner in fee and entitled to the possession of mining lands subject only to the paramount title of the United States is a sufficient allegation that he holds such a title.

Washington.

Bash v. Cascade Min. Co., 29 Wash. 50, 69 Pac. 402, 70 Pac. 487 (1902). A contract to convey land "by good and sufficient deed in fee simple" is complied with where the owner of a mining claim has paid the purchase price for his land and tenders a receiver's certificate from the land office, at least in a case where the vendee knew at the time of the making of the contract that the vendor did not have a patent for the land and with such knowledge went into possession of the land and made partial payments. "Such facts show clearly that the parties themselves not only intended that the contract to convey by good and sufficient deed in fee

simple meant such title as the vendor could convey, and that the vendee was to rely upon the covenants contained in the deed to indemnify himself against loss by reason of the nonissuance of the patent, but also that the parties themselves so construed it by their subsequent acts and conduct."

Wyoming.

Slothower v. Hunter, 15 Wyo. 189, 88 Pac. 36 (1906). See this case on page 430.

LAND OFFICE DECISIONS.

Application for patent for Edna Placer was made in 1890. The land was correctly described in the application, notices and plat as N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of sec. 14, etc. In the receipt, final certificate and patent, it was erroneously described as N. W. $\frac{1}{4}$, etc. This error was not observed until 1890, when the land department was advised, and the owners contemplated steps to surrender the patent and to obtain a new patent with correct description. In 1897 K. applied for lode patents for the same ground. The Edna applicants were not required to file adverse claims. The land was not subject to disposition at the date of K.'s entry, which was canceled. *Owers v. Killoran*, 29 L. D. 160 (1899).

By entry and purchase, the right to a patent is acquired, and that right once vested is equivalent to a patent. While such entry remains of record, it precludes the acquisition of any adverse right to the land embraced therein. This principle protects the title to a portion of ground embraced in an entry which by mistake was omitted from the patent. *McCormack v. Night Hawk & Nightingale Gold Min. Co.*, 29 L. D. 373 (1899).

The department is without jurisdiction after patent to correct mistakes made in the survey and embodied in the description, so long as the patent remains outstanding. *The Mono Fraction Lode Min. Claim*, 31 L. D. 121 (1901).

Although the land embraced in a patent passes beyond the jurisdiction and control of the department, the latter has the right to determine what lands have been patented and what remain subject to its jurisdiction. In case of a variance between the locus of a patented claim, as indicated by the tie line described in the patent from a corner of the claim to a corner of the public survey, or a United States mineral monument, and as defined upon the ground, the department regards as constituting the claim the tract of land embraced in the survey and bounded by lines actually defined and established on the ground by monuments, substantially within the requirements of the law and official regulations and corresponding to the description in the patent. To land so determined to be patented, the department will not receive further application for patent. *Sinnott v. Jewett*, 33 L. D. 91 (1904).

IV. VACATION OF PATENT.

p. 431. The act of March 3, 1891, c. 561, § 8, 26 Stat. 1099, Comp. St. 1901, p. 1521, provides that suits by the United States to vacate and annul any patents theretofore issued shall only be brought within five years from the passage of the act, and suits to vacate and annul patents thereafter issued shall only be brought within six years after the date of the issuance of such patents. Any action by the government, therefore, to set aside the patent after the expiration of that period, is barred by the statute. This act applies to all patents, whether originally valid or void. (*United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, 52 Law. Ed. 881.) The right of the government to maintain an action to annul a patent exists only against the patentee or those taking title from him with notice. It is a good defense to such action that the title has passed to a bona fide purchaser for value without notice.

United States.

United States v. American Bell Tel. Co., 167 U. S. 239, 42 Law. Ed. 144 (1897). Brewer, J., classifies the cases in which the government may maintain a suit to set aside a patent for land as follows: "First, where, the Government being the only party interested, the patent is charged to have been obtained by fraud in representations or conduct. Second, where the land by appropriate reservation is not subject to patent, but is nevertheless erroneously patented. Third, where the land, though subject to patent in the ordinary administration of the land office, is patented to the wrong person, either through fraud or by reason of mistake or inadvertence."

United States v. King, 27 C. C. A. 509, 83 Fed. 188 (1897). 9th Circ. In an action by the government to cancel a patent on the ground that it had been obtained by false and fraudulent representations, the burden of proof is on the government. "It was required to establish the fraud and connect the defendants with it. The presumption that the patent was correctly issued could only have been overcome by clear and convincing proof of the false and fraudulent representations whereby the patent was secured."

It seems that such an action cannot be maintained for fraudulent representations as to the expenditure made to the register and receiver, when the certificate of the surveyor general is in regular form and it is not charged that the fraudulent testimony was furnished to him or that it influenced his action in any way.

Peabody Gold Min. Co. v. Gold Hill Min. Co., 49 C. C. A. 637, 111 Fed. §17 (1901), 9th Circ., affirming 97 Fed. 657, 106 Fed. 241. One who locates

a claim on ground for which a patent has previously been granted to another has no standing in court to set aside the patent. A suit to set aside an existing patent on the ground of fraud can only be instituted in the name of the United States.

A patent would not be vacated even at the suit of the government for alleged fraud practised on the government in representing the claims to be quartz claims when they were in fact placer claims, since the fact that they were placer claims would not have precluded the owner thereof from obtaining a single patent therefor; and the price per acre paid for the land patented as a quartz claim was greater than would have been the price per acre for placer claims, and consequently the government was not in any way injured by the alleged deception or false representation.

"A patent which has been in existence for 16 years, and which protects rights that have been continuously exercised by the patentee and his predecessors in interest for nearly 50 years, will not be declared void as to any portion of its granted premises solely for the reason that upon its face it purports to be based upon a single mining location, and conveys more than may lawfully be included in one location, when in fact the claims were several, and might have been united in a single patent upon a proper presentation of the facts."

United States v. Stinson, 197 U. S. 204, 49 Law. Ed. 724 (1905). Brewer, J.: "While the Government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent; the presumption that all the preceding steps required by law have been observed before its issue; the immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. *Maxwell Land-Grant Case*, 121 U. S. 325, 30 Law. Ed. 949; *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 31 Law. Ed. 182; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 31 Law. Ed. 747; *United States v. Des Moines Nav. & R. Co.*, 142 U. S. 510, 35 Law. Ed. 1099; *United States v. Budd*, 144 U. S. 154, 36 Law. Ed. 384; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 42 Law. Ed. 144.

"Second. The Government is subject to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' *Maxwell Land-Grant Case*, supra, p. 381; *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 677, 32 Law. Ed. 571; *United States v. Des Moines, etc., Co.*, supra, p. 541.

"Third. It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser, for value, without notice. And,

generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but also will protect the rights and interests of innocent parties. *United States v. Burlington & Missouri River R. Co.*, 98 U. S. 334, 342, 25 Law. Ed. 198; *Colorado Coal Co. v. United States*, *supra*, p. 313."

LAND OFFICE DECISIONS.

"While the legal effect of a final decree cancelling a patent is to revest title to the land in the Government and restore it to the public domain, nevertheless the records in the land department still bear the memorandum of the entry and should be corrected to show the cancellation before other entry to the land is allowed, in the interest of orderly administration." Until, therefore, a notation of such cancellation is made upon the records, the local officers are directed to reject all proffered applications. *Hiram M. Hamilton*, 38 L. D. 597 (1910).

CHAPTER XV.

DIFFERENT KINDS OF CLAIMS, THEIR SPECIAL FEATURES AND CHARACTERISTICS.

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| I. Lode Claims. | II. Placer Claims. |
| A. Definition of Lode; Apex Rule. | III. Lodes in Placers. |
| B. Cross and Uniting Veins. | IV. Tunnel Claims. |
| | V. Mill Sites. |

I. LODE CLAIMS.

A. Definition of Lode; Apex Rule.

p. 437. The owner of a validly located or patented lode claim, although he holds title subject to the right of the owners of other lode mining claims to possess and enjoy all veins, lodes and ledges throughout their entire depth, the apex of which lies inside of their surface lines extended downward, is nevertheless *prima facie* entitled to everything beneath his surface. Other parties who enter beneath that surface and seek to mine and take ore therefrom are *prima facie* trespassers. The burden of proof rests upon them to establish that they are mining upon the dip of a vein, the apex of which lies outside of the surface under which they are mining. The cases differ as to the effect of the establishment of this fact by the presumptive trespasser. In *Montana Co. v. Clark*, 42 Fed. 626 (see vol. 1, p. 455), it was held that by establishing the fact that the defendant was following on its dip a vein whose apex was outside the limits of the plaintiff's claim, it was shown that the defendants were not trespassers because they were not following premises belonging to the plaintiff, the vein upon which they were mining being excepted by the statute from the grant to the plaintiff. The supreme court of Montana, in *Parrot Silver & Copper Co. v. Heinze*, 25 Mont. 139, 64 Pac. 326, 87 Am. St. Rep. 386, 53 L. R. A. 491, takes the view that proof that the vein has

its apex outside of the lines of the surface beneath which the alleged trespasser is mining does not negative the ownership of the locator or patentee of the surface unless it is followed by proof that the alleged trespasser is the owner by location or patent of a lode claim containing the apex. It follows from this view that the locator or patentee of a lode claim may prevent an intrusion within his surface lines by any one who cannot show his right to enter, based upon the ownership of the apex of the vein dipping beneath the surface referred to. (See, also, *Jones v. Prospect Mountain Tunnel Co.*, 21 Nev. 339, 31 Pac. 642, vol. 1, p. 468; and *Grand Central Min. Co. v. Mammoth Min. Co.*, 29 Utah, 490, 83 Pac. 648, below.) The latter view seems to be preferable in view of the fact that it is established in *Del Monte Min. & M. Co. v. Last Chance Min. & M. Co.*, 171 U. S. 55, 43 Law. Ed. 72, that extralateral rights are the creature of statute, and that in order to establish their existence the party claiming such rights must bring himself within the conditions of the statute. It would follow, therefore, that it is incumbent upon one who claims the right to mine beneath the surface of a claim which he does not own to establish both that he is following the dip of a vein whose apex is contained within the surface lines of a claim which he does own, and that he is entitled to extralateral rights thereon. For even though a locator may have the apex of a vein within his surface lines, there are instances arising from the shape of the claim or the relation of the strike of the vein to the boundary lines in which he is confined to the ownership of the mineral in this vein beneath his surface. In these instances that part of the vein which does not lie beneath his surface will belong to the owner of the surface beneath which it dips. (For a discussion of the nature of the right of the owner of a lode claim to mineral lying within the planes of his surface lines, see 'Intralimital Rights to Ore in Lode Claims,' by Henry Newton Arnold, 22 Harv. L. R. 339.)

In a normal lode claim the apex of the vein extends throughout the length of the claim within the side lines and crosses both end lines. These lines must be straight and parallel, but they may cut the lode at any angle. The side lines may be broken by any number of angles. The owner of the claim then has extralateral rights upon the dip of the vein between the parallel planes projected through the end lines. He thus acquires a portion of

the vein on its dip which corresponds to the apex contained within his surface boundaries. Various abnormal conditions are created when the vein does not cross one or both of the end lines, or when it crosses both end lines, but in its course departs for a space beyond one of the side lines. To determine what extralateral rights are possessed by the owners of claims where the conditions are thus abnormal, certain propositions have been laid down by the federal courts as follows:

FIRST. Where a vein does not cross the end lines but crosses both side lines of the claim, the side lines become the end lines, and if parallel the owner of the claim is entitled to extralateral rights between planes projected through these lines.

SECOND. If the apex of the vein crosses one end line and passes out of the claim through a side line, the owner's extralateral rights are bounded by a plane passing through the intersected end line and a plane parallel thereto, through the point at which the vein departs through the side line.

THIRD. Where the apex of the vein enters the claim through an end line, departs through a side line, returns through this side line and then departs finally through the other end line, the owner is entitled to extralateral rights between planes projected through the end lines and planes parallel thereto projected through the points of departure and return through the side line.

The extent of extralateral rights under other abnormal conditions cannot be considered as finally determined, although it may be inferred from dicta of the supreme court of the United States that where a vein enters a claim through an end line and terminates in the claim, without crossing any other line, extralateral rights are to be determined by the plane passing through the intersected end line and a plane parallel thereto projected through the point of termination of the vein.

It will be observed that the basic idea governing the decision of the questions that have been litigated is, that the owner of the claim is entitled to such a segment of the dip of the vein as corresponds with the apex contained within his surface boundaries. It would follow that where a vein crosses neither end line, but enters and departs from the claim through one of the side lines, the owner of the claim would be entitled to extralateral

rights between planes parallel to the end lines projected through the points of intersection between the vein and the side line. But while this view is supported by *St. Louis Min. & Mill. Co. v. Montana Min. Co.*, 104 Fed. 664, it is denied in *Catron v. Old*, 23 Colo. 433, 48 Pac. 687, 58 Am. St. Rep. 256, in which case it was held that under these circumstances no extralateral rights existed. In the later cases in Colorado, however, the general principle is repeatedly laid down that, for all veins, the owner has extralateral rights at least for so much thereof as apex within the surface lines.

The supreme court of the United States in *Walrath v. Champion Min. Co.*, 171 U. S. 293, 43 Law. Ed. 170, has laid down as a general proposition that the end lines of the original vein shall be the end lines of all veins found within the surface boundaries of a lode location. This proposition is easy of application in cases where secondary veins have the same general course as the discovery vein and intersect the same boundary lines of the claim as does the discovery vein. But when a secondary vein has a different direction from that of the discovery vein, and in passing out of the claim intersects other lines than those intersected by the discovery vein, the proposition has been found to be impossible of application. It has, therefore, to a great extent, been disregarded by the lower federal courts and the state courts whose disposition is to apply the general proposition that the owner of a lode claim should be entitled to as much of the lode on its downward course as he has of the apex within his surface boundaries. It seems fair to assume that the decision in *Walrath v. Champion Min. Co.* must either be confined to its actual facts or to locations under the act of 1866. (See "A Problem in Mining Law," by John Maxcy Zane, 16 Harv. L. R. 94.)

The requirement that the end lines should be parallel was introduced into the law by the act of 1872. It is therefore inapplicable to claims located under the act of 1866. The owners of such claims are entitled to extralateral rights within their exterior lines, although the end lines are not parallel. Such extralateral rights are, however, where the end lines diverge, defined by parallel planes at right angles to the general course of the lode and projected through the points at which it departs from the surface of the claim.

Where the end lines of two claims located upon the same vein are drawn at such angles as to cause an intersection of the end line planes of one claim with those of the other, the senior locator is entitled to that part of the dip of the vein within the intersections of those planes, but the junior locator is nevertheless entitled to a right of way through this intersection, and to pursue his extralateral rights beyond it. Where the width of the vein at the surface is so great that it extends beyond a side line into the surface ground of an adjoining claim, the senior locator is entitled to the whole of the vein on its dip between his end line planes, and the junior locator may only take that part of the dip outside of those planes which may be within his end line planes.

For the purpose of conforming his claim to the direction of the vein and projecting parallel end lines so as to secure extralateral rights to their full extent, not in conflict with the rights of any senior location, the lines of a junior location may be laid within, upon or across the surface of the senior location. The extent to which extralateral rights are acquired by such a location is undetermined. The owner of such a claim undoubtedly has extralateral rights between planes parallel to his end lines projected through the points at which the apex of the vein enters the senior locations; whether or not he also has extralateral rights between his end line planes, subject to the rights of the senior locators, that is rights to such parts of the dip of the vein between those planes as may extend beyond the end line planes of the senior locations, is an open question. (See "A Question of Extralateral Rights," by Henry Newton Arnold, 22 Harv. L. R. 266.)

The right to follow a vein on its dip under the surface of another claim is a right to follow along the vein only. It does not carry with it any rights to enter upon or use any part of the subsurface of such claim outside of the walls of the vein. The owner of a vein, therefore, may not tunnel through the country rock beneath the claim of another to reach the dip of the vein, nor may he go upon the surface of such a claim to sink a shaft for the purpose of reaching or working the vein.

The intersection of a lode claim by a mill site is no longer treated in the land department as conclusive that the lode does

not extend throughout the claim. The applicant for patent is allowed to establish the fact that the lode has been actually discovered in both parts of the claim. Thus, the same rule is made applicable to all intersections of lode claims by other claims, whatever the nature of the other claims may be.

United States.

Tyler Min. Co. v. Sweeney, 79 Fed. 277 (1897), 9th Circ., affirming *Tyler Min. Co. v. Last Chance Min. Co.*, 71 Fed. 848 (see vol. 1, p. 461). The priority of the Last Chance location being established, it is well settled that the Last Chance Co. is entitled to so much of the vein as lies between the planes of its side lines. The Tyler Co. has no right to cross the northern side line of the Last Chance, and it is consequently unnecessary to determine the extralateral rights of that company.

Republican Min. Co. v. Tyler Min. Co., 25 C. C. A. 178, 79 Fed. 733 (1897). 9th Circ. The supreme court having left the question of the extralateral rights of the Tyler Co. undecided in *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 39 Law. Ed. 859 (see vol. 1, p. 460), this court adheres to the view expressed in *Tyler Min. Co. v. Sweeney*, 54 Fed. 284 (see vol. 1, p. 457).

New Dunderberg Min. Co. v. Old, 25 C. C. A. 116, 79 Fed. 598 (1897). 8th Circ. See this case on page 468, above.

Waterloo Min. Co. v. Doe, 27 C. C. A. 50, 82 Fed. 45 (1897), 9th Circ., affirming *Doe v. Waterloo Min. Co.*, 54 Fed. 935 (see vol. 1, p. 457). Two veins of spar carrying silver, outcropping on adjoining claims, had clearly defined foot and hanging walls. The country rock was liparite, extending several miles above and some distance below these veins. That part which lay between the veins was more broken up than that lying outside, and was to some extent impregnated with silver. Held that each of these veins was a separate and distinct lode, that is "an aggregate of mineral matter containing ores in fissures of rocks." The mineralized zone intervening was not to be treated as the lode, as in the *Eureka Case* (see vol. 1, p. 445). The facts here present an essentially different case.

Where a patent describes the end lines of a claim as parallel, the owner cannot be deprived of extralateral rights because the end lines in the original location were not parallel. "Its rights must be determined by the terms of this patent. The description in the patent of the Silver King lode gives it parallel end lines, and grants the right to follow all lodes on their dip outside of the side lines of the same, whose apex is within the surface lines of the claim and whose strike is cut by the end lines of the claim extended perpendicularly downward." The land department has considered that, in view of the provisions of the statute, it was proper to thus word a patent for a lode claim. "To interfere with this construction of the said mineral land acts would disturb many rights long enjoyed. A contemporaneous construction of a statute by those compelled to act

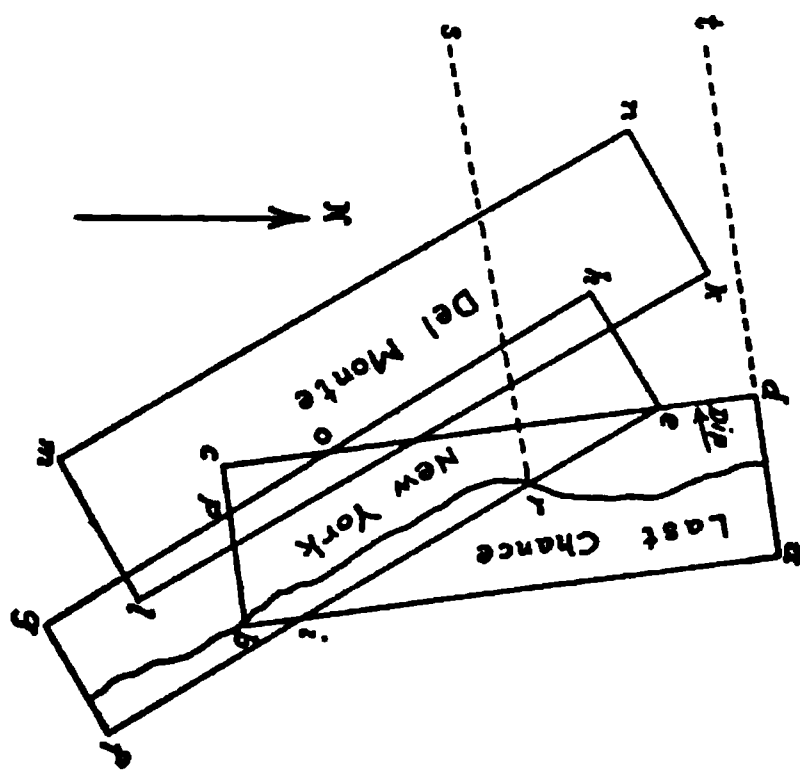
thereunder is entitled to great weight. The lodes, veins or ledges conveyed are those embraced within the mining claim located and granted in the patent. The presumptions are in favor of the correctness of the land department in issuing this patent. Its action was within its jurisdiction, and we cannot go behind the same in a collateral action." The patent in terms granted extralateral rights, and the grantee had a legal right to exercise them.

A vein entered the S. K. claim by one end line and passed on the strike out of its south side line into O. claim, whence it passed into R. C. claim, which also adjoined S. K. on the south. No part of the apex of this vein in S. K. claim was opposite R. C. claim. The owner of S. K. had no rights to that part of the vein in the R. C. claim. "The grant is to lodes having their apex in the ground patented. The fact that a part of the apex might be in the ground granted would not give any right to that part of the apex which is not therein, although the apex might be cut by both end lines of the granted premises."

Carson City Gold & Silver Min. Co. v. North Star Min. Co., 28 C. C. A. 333, 83 Fed. 658 (1897), 9th Circ., affirming 73 Fed. 597. (See vol. 1, p. 462.) The owner of a patented claim, made up of a consolidation of several claims acquired before the passage of the act of 1872, is entitled to extralateral rights in respect of any lode or vein whose apex is found within its exterior boundaries without regard to the location of the interior lines which formed the boundaries of the original claims. Such a patent is conclusive that the grantee is the owner, not only of the surface described, but also of any vein included therein, to the extent that its apex is found within the exterior lines, and of all rights and privileges incident thereto.

The fact that the end lines of the patented area were not parallel did not deprive its owner of extralateral rights. "The act of 1866, under the provisions of which the patent in this case was applied for, and under which the rights of defendant in error accrued, did not require parallelism of end lines." "Moreover the end lines converge in the direction of the dip; giving the patentees less of the vein or lode, in depth, than they had at the surface. The object of the act of 1872 in requiring parallelism of end lines was intended to give to the claimant of the lode as much of the lode or vein on its downward course as he has at the surface, but no more. It appears from the findings that the defendant in error was only allowed 2200 feet of the apex of the lode because it was cut off on the west by a 'crossing.' The restrictions of its rights in these particulars cannot be complained of by the plaintiff in error."

Del Monte Min. & M. Co. v. Last Chance Min. & M. Co., 171 U. S. 55, 43 Law. Ed. 72 (1898). The Del Monte, New York and Last Chance claims were located in the manner shown in the plan. They were located and patented in the following order: First, Del Monte, second New York, and third Last Chance. The patent for the New York excepted the ground in conflict with the Del Monte and the patent for the Last Chance excepted the ground in conflict with the New York. The following questions were certified to the supreme court by the circuit court of appeals of the 8th circuit.



"1. May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?

"2. Does the patent of the Last Chance Lode mining claim which first describes the rectangular claim by metes and bounds and then excepts and excludes therefrom the premises previously granted to the New York Lode mining claim con-

vey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim?

"3. Is the easterly side of the New York Lode mining claim an end line of the Last Chance Lode mining claim within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?

"4. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such a vein follow it upon its dip beyond the vertical side line of his location?

"5. On the facts presented by the record herein has the appellee the right to follow its vein downward beyond its west side line and under the surface of the premises of appellant?"

The first and fourth questions are answered in the affirmative, the third in the negative, the second and fifth not answered.

Extralateral rights are unknown to the Spanish and Mexican law as well as to the common law; they are entirely the creature of statute and in order to entitle himself thereto a party must bring himself within the conditions of the statute or be content with simply the mineral beneath the surface of his claim.

"The law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein and the discoverer desire to take the entire surface and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purpose of location, he be permitted to place those end lines on territory already claimed by the prior locators.

"Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as

much of the unappropriated, and perhaps only partially discovered and traced vein, as is possible."

"The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, unenclosed and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain and where the validity of apparent locations is unsettled and doubtful. Under those circumstances it is not strange—on the contrary it is something to be expected and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must—when it appears that his lines are to any extent upon territory covered by a prior valid location—go through the form of making a relocation simply works delay and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines.

"In this connection it may be properly inquired what is the significance of parallel end lines? Is it to secure to the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be like the ordinary public surveys in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked a feature of the range, township and section system? Clearly not. While the contemplation of Congress may have been that every location should be in the form of a parallelogram, not exceeding 1500 by 600 feet in size, yet the purpose also was to permit the location in such a way as to secure not exceeding 1500 feet of the length of a discovered vein, and it was expected that the locator would so place it as in his judgment would make the location lengthwise cover the course of the vein. There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downwards outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are bounded by the several lines of his

location, and the end lines must be parallel in order that going downwards he shall acquire no further length of the vein than the planes of those lines extended downward enclose. If the end lines are not parallel, then, following their planes downward his rights will be either converging and diminishing or diverging and increasing the farther he descends into the earth. In view of this purpose and effect of the parallel end lines it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or underground rights.

"For these reasons, therefore, we are of opinion that the first question must be answered in the affirmative.

"It may be observed in passing that the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. In other words, referring to the first diagram, the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line *r s*, even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line *e h*, the end line of the New York claim, extended downward into the earth, will, at a certain distance, pass to the south of the line *r s*, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end line of the Last Chance, *b c*, extended vertically into the earth, belongs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line *a d t* and the line *r s*, and to appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration."

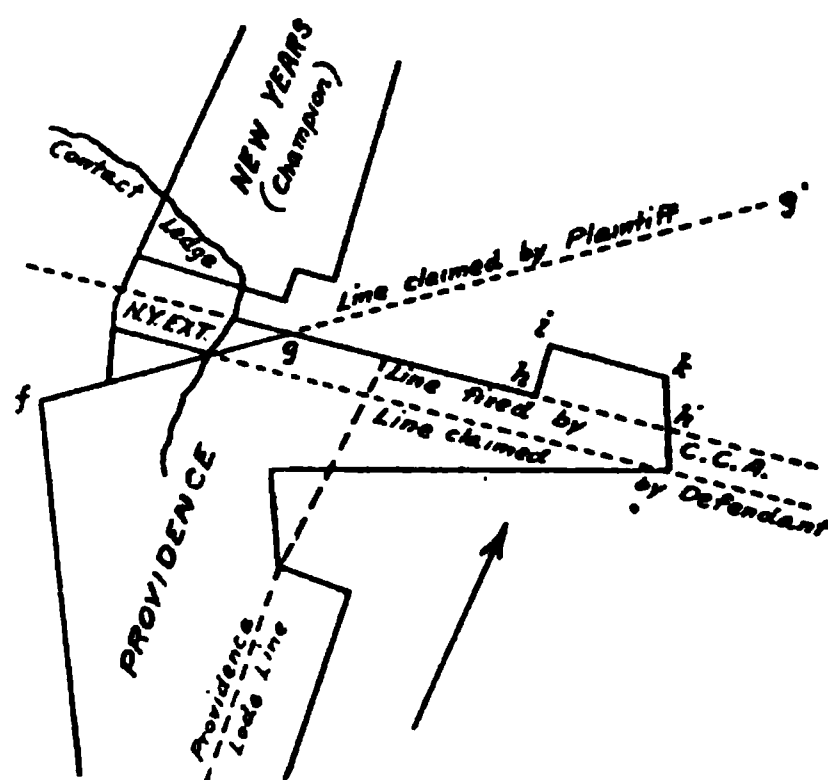
"Suppose a vein enters at an end line, but terminates half way across the length of the location, his right to follow that vein on its dip beyond the vertical side lines is as plainly given by the statute as though in its course it had extended to the farther end line. It is a vein, 'the top or apex of which lies inside of such surface lines extended downward vertically.' And the same is true if it enters at an end and passes out at a side line.

"Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins

along their course or strike. Third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location."

Clark v. Fitzgerald, 171 U. S. 92, 43 Law. Ed. 87 (1898), affirms *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273 (see vol. 1, p. 468), on authority of *Del Monte Min. & M. Co. v. Last Chance Min. & M. Co.*, above.

Walrath v. Champion Min. Co., 171 U. S. 293, 43 Law. Ed. 170 (1898), affirming 72 Fed. 978 (see vol. 1, p. 461).



Walrath was the owner of the Providence Mine, which had been patented under the act of 1866. The patent by its terms conveyed "the said vein or lode in its entire width for the distance of thirty one hundred feet along the course thereof." The vein referred to is the Providence vein as shown on the plan. The defendant located the New Years Extension claim under the Act of 1872. It originally overlapped the surface ground of the Providence, but the overlap was subsequently relinquished. This suit

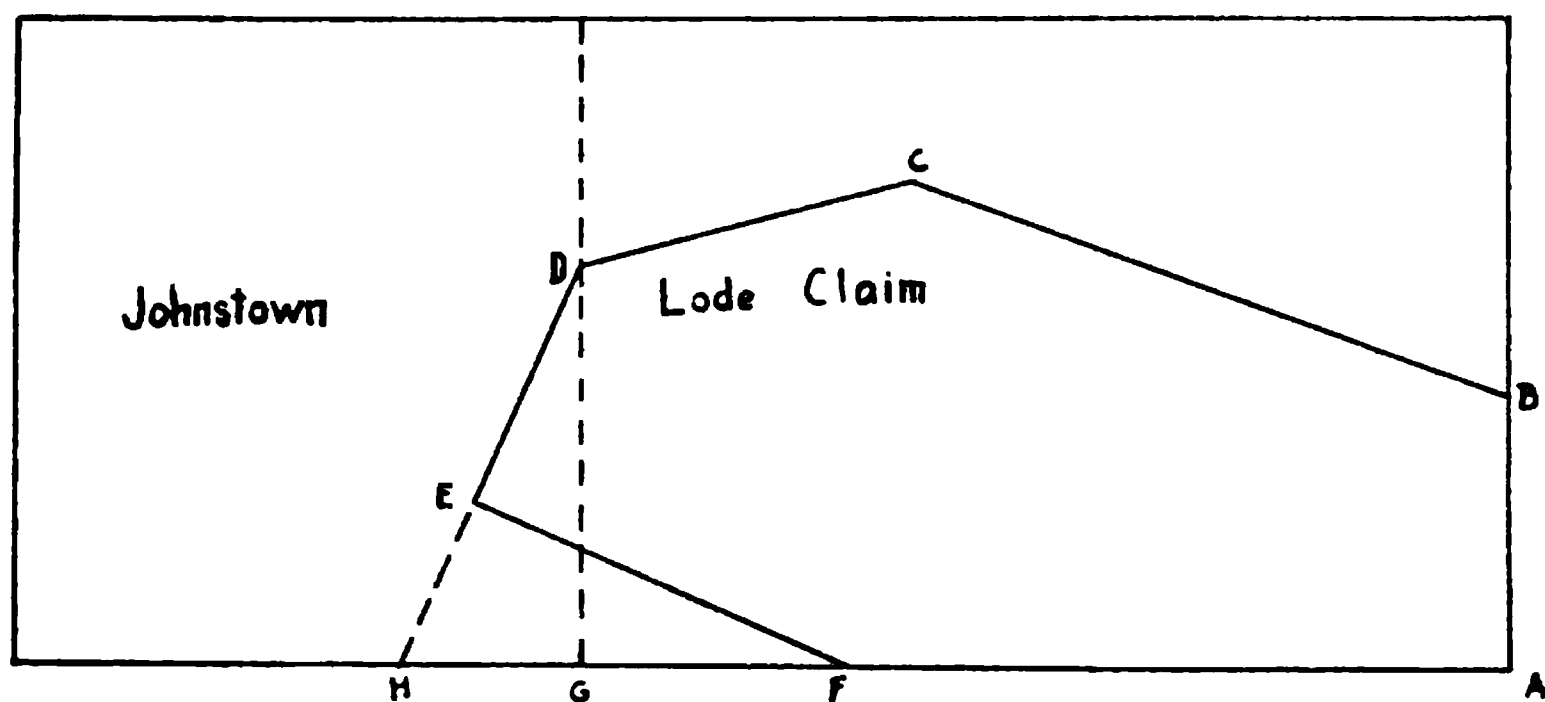
was brought to enjoin the defendant from mining on the Back or Contact vein south of the plane through the line *f g* extended. The circuit court held that the plaintiff's extralateral rights on this vein were limited by the lines *f g* and *g h*. The circuit court of appeals held that these rights were limited by the end line of the claim, namely, *g h*, and that the defendant should be enjoined from mining south of the plane projected upon that line extended. The defendant had claimed that the limit of its rights was a line parallel to the end line of the Providence, drawn through the point at which the Contact vein passed out of that claim through the line *f g*. The plaintiff only appealed, and the court held that the case of *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463, 25 Law. Ed. 253 (see vol. 1, p. 443), established that the intent of both the act of 1866 and the act of 1872, as it respects end lines and side lines, was the same and

that the right to follow the dip of the vein is bounded by the end lines of the claim, that is, those which are crosswise of the general course of the vein on the surface; and that "the act of 1872 gave to all locations theretofore made, as well as those thereafter made, all veins, lodes and ledges the top or apex of which lie inside of the surface lines."

The propositions set forth in *Del Monte Min. & M. Co. v. Last Chance Min. & M. Co.*, above, are quoted and approved "with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries." The judgment is consequently affirmed. One of the results of this is that the plaintiff has no right to such part of the Contact vein as lies within the lines of the parallelogram h-i-k-h'. "But the rights on the strike and on the dip of the original vein and rights on the strike and on the dip of the other veins, we have decided, are determined by the end lines of the location. In other words, it is the end lines alone, not they and some other lines, which define the extralateral right, and they must be straight lines, not broken or curved ones."

Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co., 89 Fed. 529 (1898). C. C. N. D. Mont. Where a portion of a lode claim is conveyed, the extralateral rights of the owner of that portion are controlled by the end line described in the conveyance, although it is not parallel to the end line of the original claim.

The owner of the Johnstown claim conveyed the portion enclosed in the hexagon, A B C D E F, and then sought an injunction against the owner of this part from mining on the dip of the vein within the triangle G D



H. This was refused. (But see *Montana Ore Purchasing Co. v. Boston & Montana Consol. Silver & Copper Co.*, 27 Mont. 288, 70 Pac. 1114, below.)

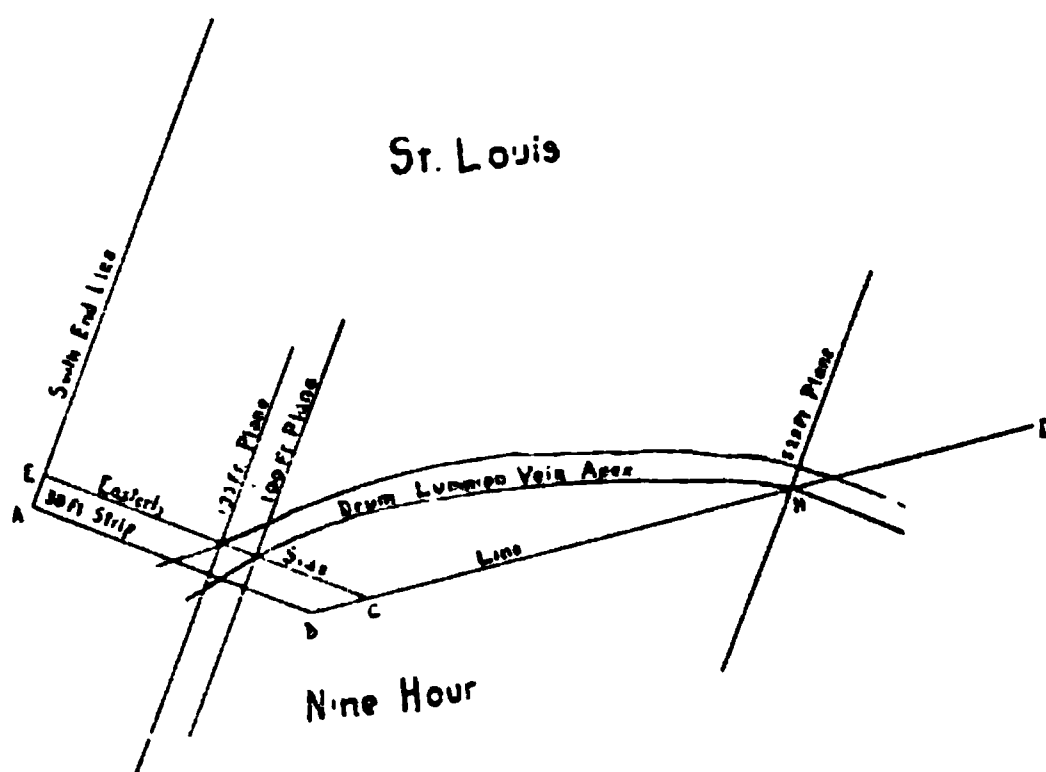
Rozanna Gold Min. & Tunneling Co. v. Cone, 100 Fed. 168 (1899). C. C. D. Colo. An injunction to restrain a defendant from taking ore from underneath the surface of the complainant's claim will not be granted where the complainant admits that the apex of the vein from which the ore is being taken is not on his land, and the only question is whether it is on the land of the defendant or on the land of a third party.

There were two veins, one of which had its apex on defendant's claim, and the other in the claim of a third party. These veins, the complainant alleged, united on their dip, and extended under complainant's claim, whence ore was being taken by the defendant. The controversy was properly between the owners of the claims in which the two veins had their apexes, and complainant was in no position to claim the ore removed by defendant.

Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co., 100 Fed. 910 (1900), C. C. D. Conn., followed in 131 Fed. 339 (1904). C. C. D. Conn. Where, through a mistake as to the direction of the lode, a claim is located crosswise instead of lengthwise of the vein, the side lines as located become the end lines of the claim and the end lines as located become the side lines of the claim, so that the locator may follow the dip of a vein, the apex of which is on his claim, outside of vertical planes extended downward from what he located as the end lines of his claim, as long as he does not go outside of vertical planes extended downward from the lines which the law designates as the real end lines of his claim.

Cosmopolitan Min. Co. v. Foote, 101 Fed. 518 (1900). C. C. D. Nev. Where a claim is located crosswise instead of lengthwise of the lode, the lines located as side lines become the end lines. If the locator subsequently discovers within his lines the apex of another vein which runs parallel to the side lines as located, he is nevertheless, as to this vein, also, bound by his actual end lines, that is, those which lie across the course of the vein upon which the location was based, and he cannot follow on its dip the lode subsequently found, beyond vertical planes extended downward through the lines which he mistakenly located as side lines.

St. Louis Min. & Mill. Co. v. Montana Min. Co., Ltd., 44 C. C. A. 120, 104 Fed. 664 (1900), 9th Circ., reversed on another point in 204 U. S. 204, 51 Law. Ed. 444, below.

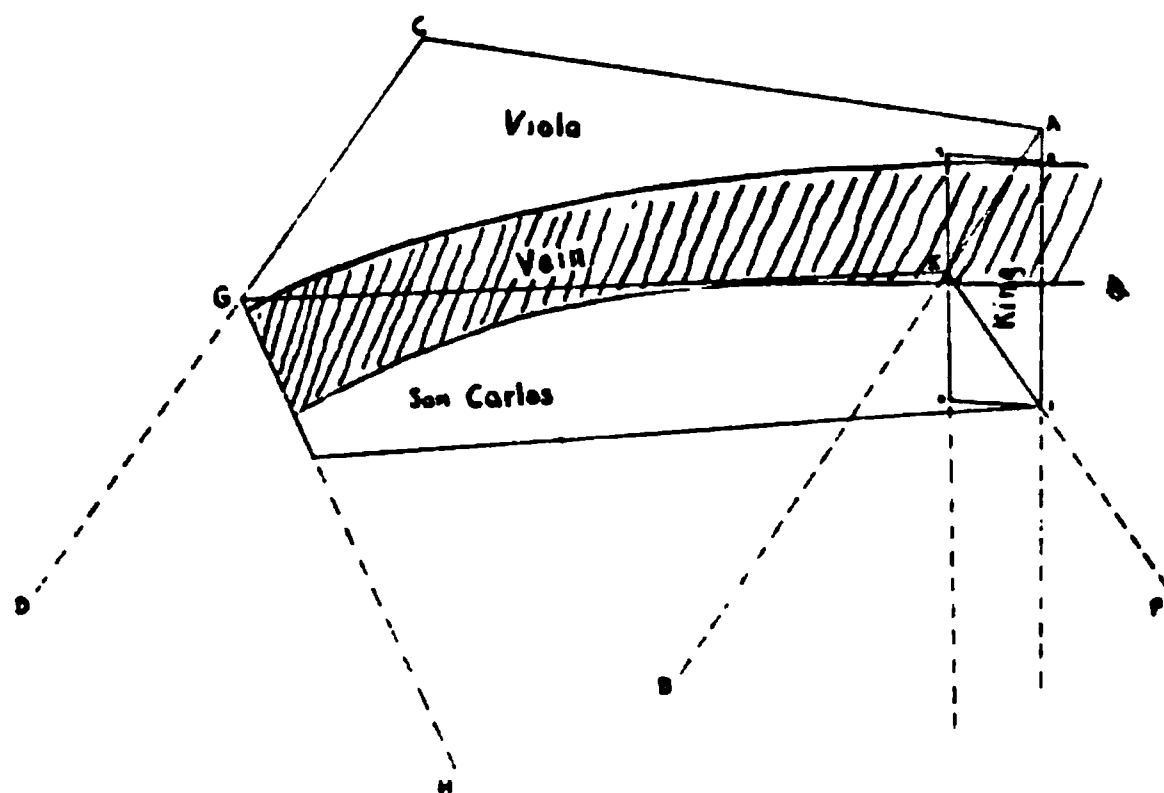


A lode claim can have but two end lines, and when they have been once established they become the end lines for all veins found within the surface boundaries. It having been determined (in 102 Fed. 430) that E C D is a common side line of the two claims, it cannot be considered an end

line for the Drum Lummon Vein, which was not the vein upon which the location was based but was a subsequently discovered or secondary vein. When such a vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, such portion of the vein belongs to the senior locator, and the right of lateral pursuit remains with him within a plane parallel to the end line of the senior claim, and up to the point of departure of the apex. "Inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line."

Bunker Hill & Sullivan Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co., 48 C. C. A. 665, 109 Fed. 538 (1901), 9th Circ., affirming 108 Fed. 189. In the absence of objection by the owner of a senior lode location, a junior locator may lay his lines partly within the surface of such senior location and acquire thereby, as against all but the owner of the senior location, the same extralateral rights that he would acquire if no part of his lines was upon a prior location.

Empire State-Idaho Mining & Development Co. v. Bunker Hill & Sullivan Min. & Concentrating Co., 52 C. C. A. 219, 114 Fed. 417 (1902), 9th Circ., reversing *Bunker Hill & Sullivan Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.*, 106 Fed. 471 (1901). C. C. D. Idaho.



The claims shown on the diagram were entitled to priority in this order: 1. Viola; 2. San Carlos; 3. King, the latter being owned by the plaintiff and the two former by the defendant. The vein had its apex in width partly within the Viola and partly within the San Carlos. The owner of the Viola was consequently entitled to the entire width of the vein and its extralateral rights were limited by planes drawn through the lines A B and C D. The circuit court held that the San Carlos claim was not entitled to extralateral rights, and that the extralateral rights of the King were bounded by planes through the lines 2-1 prolonged and A E and E 4 prolonged. Consequently the plaintiff and not the defendant would have the right to mine on the dip of the vein between those lines. The appellate court held that the San Carlos claim was entitled to extralateral rights, the subject, however, to the rights of the Viola. The defend-

ant's right to mine on the dip of the lode therefore extended to and was bounded by the line E F extended; this right, being prior to that of the plaintiff, was superior.

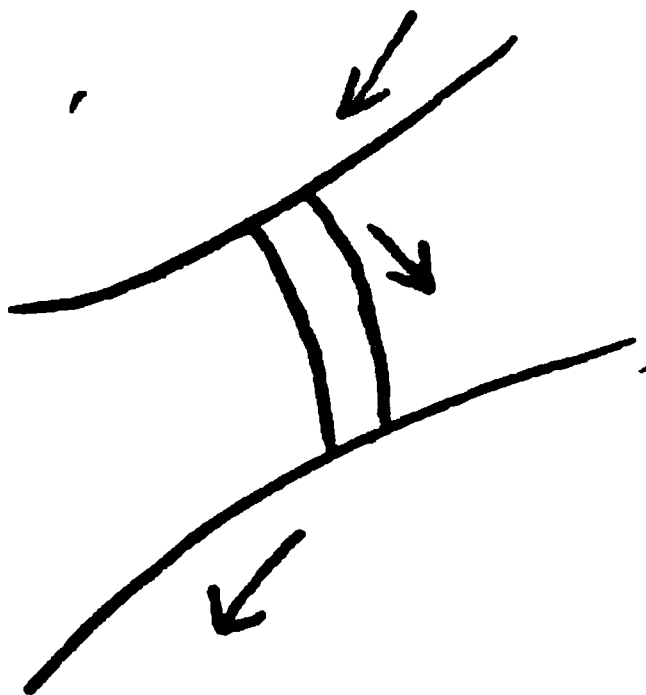
Ross, C. J.: "The Viola, being the older of the two locations, would, under the doctrine of *St. Louis Min. & Mill. Co. of Montana v. Montana Min. Co.*, 44 C. C. A. 120, 104 Fed. 664, 56 L. R. A. 725 * * * be entitled, in the pursuit of its extralateral rights, to the entire width of the vein underground within its bounding planes. But extralateral rights apply only to what may be found beneath the surface within the limits fixed by the statute, and never operate to enlarge or contract surface rights. Surface rights are limited by the statute to 300 feet in width on each side of the center of the ledge or lode, yet such ledge or lode may extend beyond such side lines and in the case at bar did extend southerly of the southerly side line of the Viola claim, and into unappropriated public land. The locator of the San Carlos claim, finding it outcropping there, made the San Carlos location upon it, as he had the right to do, and as the government recognized, by issuing its patent in confirmation thereof. The ledge or lode crossing both of the end lines of that claim, the extralateral rights conferred by the statute thereupon arose, subject, however, to the extralateral rights of the prior Viola location, which were, as all such rights are, confined between vertical planes drawn down through its end lines, extended indefinitely in their own direction, which gives to the Viola, as against all of the claimants here appearing, the underground portion of the vein or lode on its dip between vertical planes drawn down through the lines A E and C G of the diagram, extended indefinitely in their own direction. But where the prior extralateral rights of the Viola cease, namely at the line E B of the diagram, those of the next locator (of the San Carlos) commence, and embrace that portion of the dip of the vein or lode not included within the rights of the Viola, and embraced within vertical planes drawn down through the end lines of the San Carlos extended, etc." These lines included the ore bodies in controversy. The King claim being subsequent in location, it became unnecessary to determine what were its extralateral rights.

The circuit court in discussing what constituted the lode in this case found that it had a distinct foot wall but no developed hanging wall, and said: "Thus far it is evident that the foot wall was the center of action and of the force which created it, and so crushed the hanging country into fragments as to prepare the various irregular receptacles for the deposit of the ore found in detached and very irregular bodies. A limit must be reached where the creating cause of these cavities in the formation ceased to operate, and that limit would be the limit of the mineralized zone. It is most probable that no distinct hanging wall exists, but until one is developed, the limits of the ore bearing section should measure the width of what, in law, is the ledge."

Larned v. Jenkins, 51 C. C. A. 344, 113 Fed. 634 (1902). 8th Circ. One who discovers a lode and locates a claim thereon, under the Act of 1866, renounces and abandons all rights and privileges to follow his lode

on its course beyond the exterior lines of his patented claim, when he locates it upon the surface of the ground, enters it and accepts a patent for it under the law. That gives him "the right to follow such vein or lode with its dips, angles and variations to any depth although it may enter the land adjoining." "The words 'to any depth' as well as the other provisions of the statute which require the locator to file a diagram of the tract he claims, and permit him to receive a patent of this limited area, demonstrate the fact that it was not the intention of congress to grant to the patentee of a lode mining claim under the act of 1866 the right to follow it on its strike beyond the boundaries of the location he selects and secures." "It permits him to follow it beyond those boundaries on its dip or descending course only."

Pennsylvania Consol. Min. Co. v. Grass Valley Exploration Co., 117 Fed. 509 (1902). C. C. D. Cal. In pursuing a vein under another claim in order to make connection between what the plaintiff claimed were upper and lower portions of the same vein, and the defendant claimed were different veins, it was necessary in several places to step down from six to eight feet through country rock. The plaintiff's witnesses testified that these disconnected sections were parts of a continuous vein which simply split at certain points, the upper section pinching out, but before it pinched out a series of fissures dipping in an opposite direction fell from it and connected with the lower section, as illustrated below:



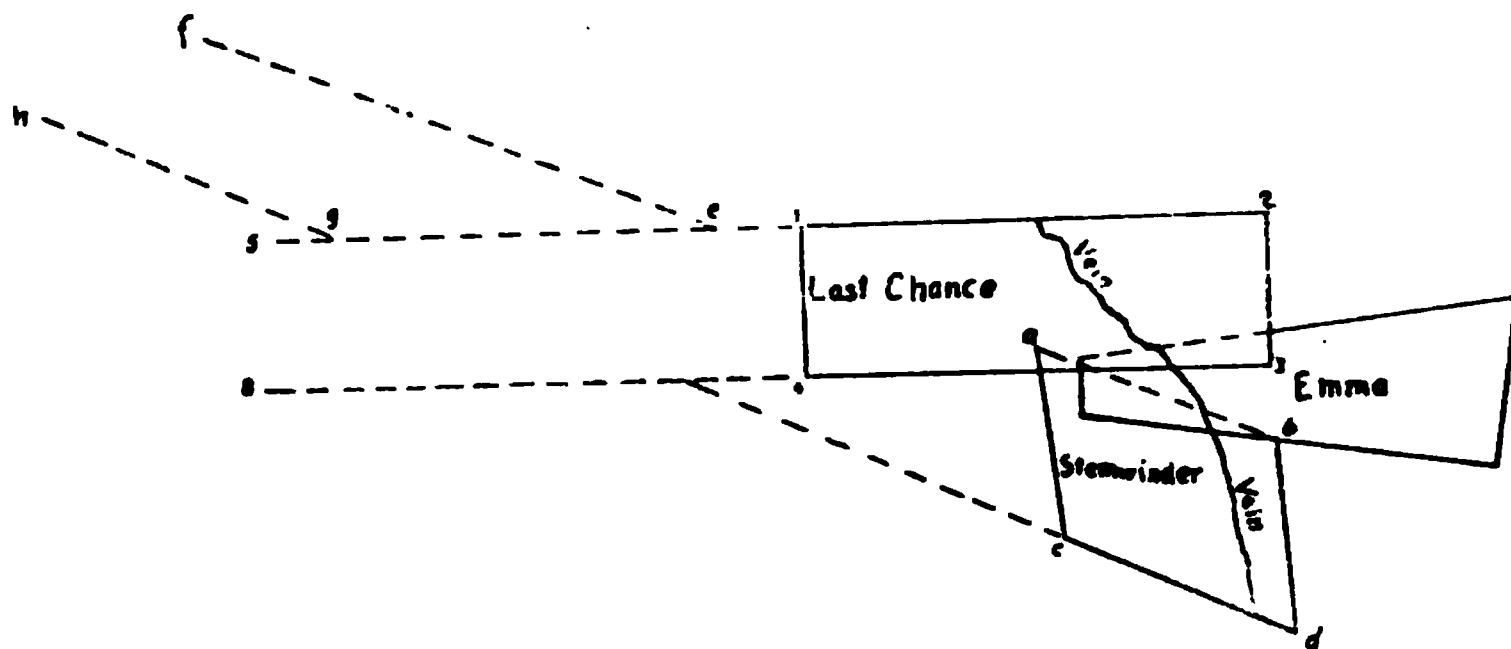
The court held that the vein was continuous, relying principally upon the fact that the vein could be followed as a dominant persistent vein from the surface through continuous stopes down to the lower workings of the mine.

The fact that the main vein has seams or spurs branching off in directions other than that of the main vein does not destroy its continuity lengthwise, where it otherwise has extent and continuity in the direction of the side lines of the claim.

Kennedy Min. & M. Co. v. Argonaut Min. Co., 189 U. S. 1, 47 Law. Ed. 685 (1903), affirming *Argonaut Min. Co. v. Kennedy Min. & Mill Co.*, 131 Cal. 15, 63 Pac. 148. As the result of an adverse claim, a compromise was entered into whereby the parties agreed upon a common end line, and patents were issued to both in accordance therewith. The boundary line so agreed upon fixed the rights of the parties in length on the lode and governed questions of extralateral rights between them, without regard to whether it was parallel to the other end line. Parties succeeding to these titles with knowledge of the boundary line so determined were concluded by it and the results following therefrom.

Empire State-Idaho Min. & Developing Co. v. Bunker Hill and Sullivan Min. & Concentrating Co., 58 C. C. A. 311, 121 Fed. 973 (1903). 9th Circ.

Where a vein apexes within the boundaries of two locations, and, after passing through ground within the end line planes of both locations, comes into ground within the end line planes of the junior location only, the owner of the senior location is entitled to the part of the vein at the intersection of the end line planes of the two claims, but the junior locator is entitled to a right of way through this intersection and has the right to pursue the vein beyond it, within the planes of his end lines. The extralateral rights of the parties are analogous to the rights of locators on intersecting veins.



The claims were located as shown in the diagram, the Stemwinder being the junior location. Its owner was held to be entitled to the vein on its dip within the planes drawn through the lines f e g h. "If the vein upon which the Stemwinder is located were in fact a separate vein from that on which the Last Chance is located, but passed through the latter in the same direction in which extralateral rights are claimed in the present suit, there could be no doubt of the right of the owner of the Stemwinder to pursue the vein beyond the point of intersection and to maintain a right of way through the vein of the Last Chance at the point of intersection. We see no reason why that right, which is so recognized by the statute, and which would probably be recognized in the absence of a statute, shall be denied when the point of intersection of extralateral rights is not upon separate veins, but upon the same vein."

The possession and ownership of the surface of a lode mining claim is the possession of the lode to the full extent of the extralateral right of the owner of the claim, so as to entitle the owner of such surface to secure an injunction against a stranger's unauthorized entry on, and occupation of, the lode.

Bevis v. Markland, 130 Fed. 226 (1904). C. C. E. D. Wash. Lack of evidence to prove the existence of a vein of metallic ore of sufficient value to pay for extracting the metal is not sufficient to entitle the locator of a placer mine to recover possession from a prior lode locator. The validity of a vein or lode claim, located in good faith and based upon a discovery of indications sufficient to justify the expenditure of labor and money

in an effort to uncover a valuable mine, cannot be denied, before development work has progressed sufficiently to disprove the surface indications.

Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co., 66 C. C. A. 299, 131 Fed. 579 (1904). 9th Circ. There is no difference in the nature of the right by which the locator of a valid lode claim holds the veins or lodes embraced by the surface lines extended vertically downward, and that by which he holds such of the veins or lodes belonging to the claim as extend in their downward course outside of its side lines. No adverse rights may be acquired as to the latter which could not be acquired in respect to the former. "The mining right is an integral one, and is precisely the same to all that belongs to the location—its surface, and all veins or lodes apexing within it, and all not apexing elsewhere, found within the surface lines extending vertically downward, as well as the extralateral right defined by section 2322 of the Revised Statutes of the United States."

Where the lines originally located as the side lines of a claim are parallel, and the apex of a vein or lode crosses those lines, they become in law the real end lines of the claim.

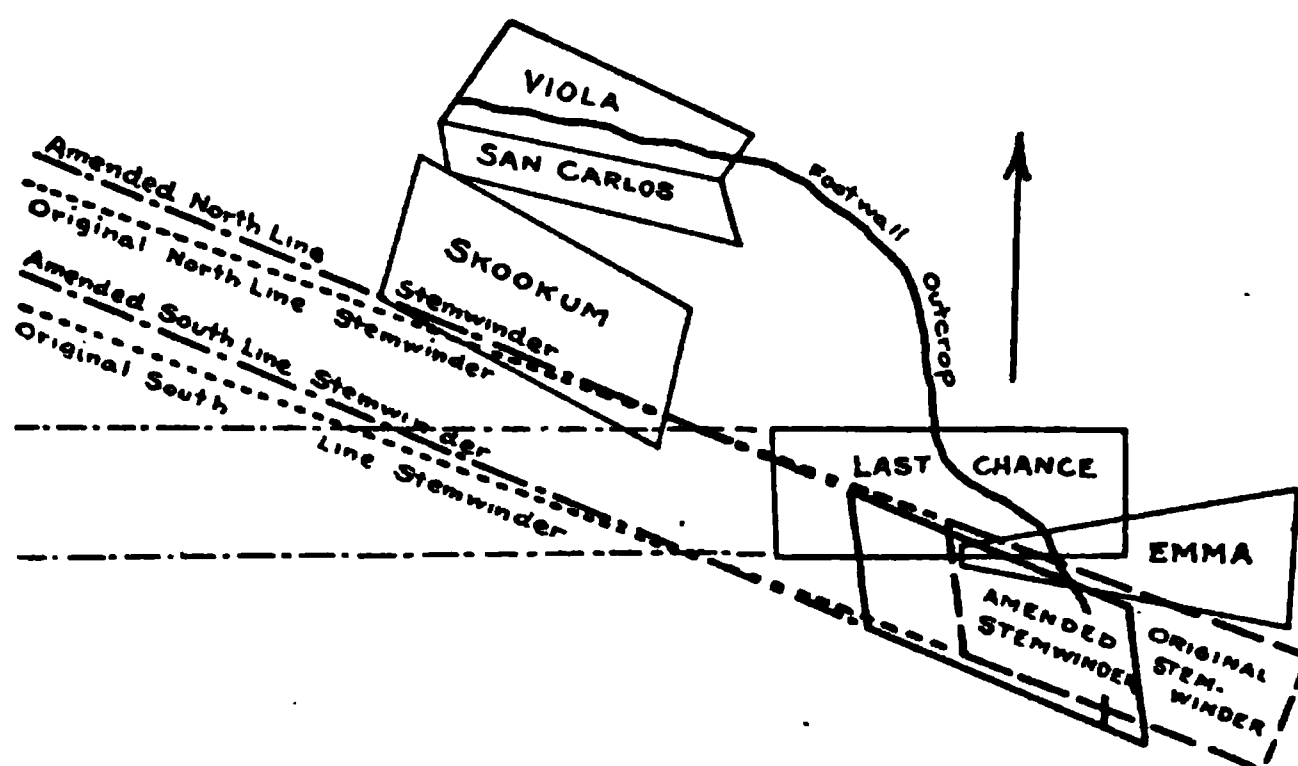
Even if a vein or lode be so wide on the surface as to extend outside of and beyond one of the side lines of a claim, the locator of such claim may pursue his extralateral rights therein as against an adjoining junior location.

The extralateral right to a vein or lode outcropping at the surface is fixed by the course of the vein at the surface and not by its course on a level. "While the statute requires parallelism of the end lines, and the courts have held that they may not be laid so divergent as to include more in length upon the dip of the vein than is allowed in length upon the surface, neither the statute nor any decision to which our attention has been called defines any particular angle at which the end lines shall cross the general course of the vein in order that the extralateral right given by the statute may exist. And as said by the Supreme Court (in *Iron Silver Min. Co. v. Elgin Min. & S. Co.*, 118 U. S. 196, 30 Law. Ed. 98), where more than one vein apexes within the surface lines it would be a physical impossibility for the end lines to be drawn at a right angle to the course of all such veins. And that the extralateral right conferred by the statute may and does exist without regard to the angle at which the end lines cross the general course of the vein has been held both by the Supreme Court and by this Court."

Empire State-Idaho Min. & Developing Co. v. Bunker Hill & Sullivan Min. & Concentrating Co., 66 C. C. A. 99, 131 Fed. 591 (1904), 9th Circ., affirming *Bunker Hill & Sullivan Min. & Concentrating Co. v. Empire State-Idaho Min. & Developing Co.*, 134 Fed. 268 (1903). C. C. D. Idaho.

The decision in this case in 58 C. C. A. 311, 121 Fed. 973, above, is followed on the question of the extralateral rights of the Stemwinder as against the Last Chance and the Emma. In addition to the last two claims, the appellant also owned the Viola, San Carlos, and Skookum. The location of these three claims was subsequent to the original location of the

Stemwinder, but prior to the amended location of that claim. In the notice of this amended location it was stated that the original location had been mistakenly laid across the vein and the object of the amendment was to conform to the laws relating to mining claims; and that it was not intended to abandon any rights under the original location. As is shown on



the diagram, the amended end lines did not coincide with the original lines. It was held that the extralateral rights of the Viola, San Carlos and Skookum could not be affected by the amended location of the Stemwinder; and consequently the extralateral rights of the latter, beyond the north line of the Last Chance, were confined within the limits of the original north line and the amended south line of the stemwinder.

As it did not appear that such parts of the lines of the Stemwinder as were laid upon the ground of the Emma and the Last Chance were put there forcibly or surreptitiously or otherwise fraudulently or against the consent of the owners of these claims, those lines, under the decision in *Del Monte Min. & M. Co. v. Last Chance Min. & M. Co.*, above, were the lines by which the extralateral rights of the Stemwinder were to be defined and not the line of the Emma claim. Nor were these rights to be confined by reason of a monument erected as a boundary by previous owners of the claims. Where the owners of two overlapping claims build a stone monument which they orally agree shall mark the boundary line of the two claims, and another person acquires one of these claims without any knowledge of such oral agreement, and amends the location of his claim, he can pursue his extralateral rights in accordance with his amended location, and unaffected by such oral agreement, as against a third person who has no privity or connection with the owner of the other of the two overlapping claims.

St. Louis Min. & Mill. Co. v. Montana Min. Co., 194 U. S. 235, 48 Law. Ed. 953 (1904), affirming 51 C. C. A. 530, 113 Fed. 900 (1902). 9th Circ. A patent for a lode claim conveys the subsurface as well as the surface; and one who is not the owner has no other right to disturb the subsurface than that given to the owner of a vein apexing without its surface but

descending on its dip into the subsurface, to pursue and develop that vein. The right of such an owner is limited to working upon and following the vein itself into the subsurface of the other claim. He may not construct a tunnel through the country rock under the surface of that claim for the purpose of reaching his vein and working it, even though such tunnel will not intersect any other vein.

Montana Min. Co. v. St. Louis Min. & Mill. Co., 204 U. S. 204, 51 Law. Ed. 444 (1907), reversing 147 Fed. 897 (1906), 102 Fed. 430 (1900); and *St. Louis Min. & Mill. Co. v. Montana Min. Co.*, 44 C. C. A. 120, 104 Fed. 664, 56 L. R. A. 725 (1900). 9th Circ. The application for patents for the St. Louis and Nine Hour claims overlapped. Adverse proceedings having been commenced, a compromise was effected by which the owner of the St. Louis agreed to proceed to obtain a patent and then to convey to the owner of the Nine Hour a piece of ground (A B C E on the diagram on page 498) "together with all the mineral therein contained." A patent to St. Louis having been obtained, the owner of Nine Hour brought a bill for specific performance and obtained a decree, in accordance with which the described tract was conveyed "together with all the mineral therein contained; together with all the dips, spurs and angles and also all the metals, ores, gold and silver bearing quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed." A secondary vein apexing on the St. Louis dipped beneath the surface of the compromise tract. It was held that the owner of the St. Louis did not have the right to mine on the dip of this vein beneath that tract. Something more was intended and accomplished by the settlement than the mere establishment of a surface boundary.

"It is undoubtedly true that if the bond had simply described the surface area or fixed a boundary line between the two claims, the subsurface and extralateral rights might have been determined by the mining law. It might have been implied that there was no intention to disturb the rights given by it.

"Further, while it may be true that the words 'together with all the dips, spurs and angles,' etc., are generally employed in conveyances of mining claims in order to emphasize the fact that not merely the surface but the extralateral rights which go with a mining claim are conveyed, yet it must be noticed that in addition to these customary words are these, found in both the bond and the deed, 'together with all the mineral therein contained,' and they cannot be ignored, but must be given a meaning reasonable and consistent with other parts of the instruments. It is not satisfactory to say that they are only equivalent to those that follow, 'dips, spurs,' etc., that the same thing is meant by each expression. While of course repetition is possible, yet it is not to be expected; and when, in addition to the ordinary words found in conveyances of mining claims, is this extra clause, we naturally regard it as making some further grant."

The decision of this point rendered it unnecessary to consider the other questions which were passed upon in the court of appeals. (See page 498, above.)

East Central Eureka Min. Co. v. Central Eureka Min. Co., 204 U. S. 266, 51 Law. Ed. 476 (1907), affirming *Central Eureka Min. Co. v. East Central Eureka Min. Co.*, 146 Cal. 147, 79 Pac. 834, 9 L. R. A. (N. S.) 940 (1905). Plaintiff, having applied for patent before the passage of the act of 1872, was granted a patent after the passage of that act. This patent granted the premises by metes and bounds and the exclusive right of possession and enjoyment of the same and of 1165.56 lineal feet of the vein throughout its entire depth although it might enter land adjoining, with similar rights in other veins having their apex within the surface bounds. The owner of this claim was held to be entitled to extralateral rights although his end lines were not parallel.

"Before the act of 1872 it was not required that the end lines should be parallel; and when, with some dissent, it was decided that that requirement of that act made a condition to the right of a patentee to follow his vein outside of the vertical planes drawn through his side lines, the decision was confined in terms to cases where the location was made since the passage of the act. 118 U. S. 208, 30 Law. Ed. 98. That there is no such condition when the patent was issued in pursuance of proceedings under the earlier statutes has been decided, so far as we know, when the question has arisen."

"Under the former law the miner located the lode. When the act of 1872 substituted the location of a piece of land by surface boundaries, it preserved the rights of locators to all mining locations previously made in compliance with law and local regulations, and provided that they should 'have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of said surface locations.' Section 3. Rev. St. 2322. It is argued that this refers only to possessory rights, and that when a patent was applied for it was required to conform to the new law; that under the old law the miner got but a single vein, while the new law gave him all veins having their apex within the surface, and that when he accepted this advantage he had to comply with the conditions, as otherwise he would be given a preference over later comers. It is said further that in the present case no rights had been acquired. These arguments do not command our assent, for reasons which we will state.

"A broader construction of the passage quoted from § 3 is favored by other provisions in the act. It provided that the repeal of certain sections of the act of 1866 'shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the General Land Office; but in such cases when adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act.' Section 9. So in § 12: 'Nor shall this act affect any right acquired under said act' (of 1866). And in § 16. 'Pro-

vided that nothing in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws.' Whatever ambiguity may be found in the first of these quotations, the last is plain. The chance of a possible advantage to outstanding applicants does not seem to us to outweigh the injustice of preventing them from getting what the law had promised as the reward for the steps they had taken in accordance with its invitation."

Lawson v. United States Min. Co., 207 U. S. 1, 52 Law. Ed. 65 (1907), affirming *United States Min. Co. v. Lawson*, 67 C. C. A. 587, 134 Fed. 760 (1904). 8th Circ. The circuit court of appeals said: "A careful examination and consideration of the evidence clearly convinces us that the stratum of limestone constitutes a single broad vein or lode of mineral bearing rock extending from the quartzite on one side to the quartzite on the other. The limestone has been profoundly broken, altered and mineralized, and has thereby obtained an individuality which, apart from other differences, clearly distinguishes it from the neighboring rock. There is a local absence of ore in places, a continuous occurrence of it in others, and a seeming local occurrence of it in still others, but the ore bodies are not separated one from another by any defined boundaries. As in *Eureka Consol. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 302, 8 Fed. Cas. No. 4,548, they are parts of one greater deposit, which permeates in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone. * * * The mineralization has been so general that its only defined limits are the quartzite walls which bound the limestone, and within it one may reasonably expect to encounter ore by driving or cross-cutting in any direction.

"In addition to the many small fissures which exist only in the limestone and extend in every direction, other ore-bearing fissures (of a transverse direction) are found in the quartzite, and it is the contention of the defendants that these extend through the limestone, that its mineralization is due to them and occurred at the same time and in the same manner as did the deposition of the ore in them, and that the ore bodies in the limestone are lateral continuations or appendages of these cross-fissure veins. Of this it is sufficient to say that, whatever may have been the mineralizing process, the alteration and mineralization of the limestone were so general and extensive as to convert it into a single broad vein or lode, within which the cross-fissure veins are without defined boundaries, and so far lose their identity that they cannot be distinguished from the larger ore bodies therein. The ore in the quartzite is inconsiderable in amount and is confined to these fissure veins, but it is not so in the limestone.

* * * The ore bodies within the claimed spaces of intersection created by the cross-fissures * * * are not susceptible of identification and separation from those in the stratum of limestone, and must be held to be parts of the single broad vein or lode, and not parts of distinct and independent cross-fissure veins.

"Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its

dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side lines. This is so because it has been the custom among miners, since before the enactment of the mining laws, to regard and treat the vein as a unit and indivisible in point of width, as respects the right to pursue it extralaterally beneath the surface; because usually the width of the vein is so irregular, and its strike and dip depart so far from right lines that it is altogether impracticable, if not impossible, to continue the longitudinal bisection at the apex throughout the vein on its dip or downward course; and because it conforms to the principle pervading the mining laws, that priority of discovery and location gives the better right, as is illustrated in the provision giving to the senior claim all ore contained in the space of intersection where two or more veins intersect or cross each other, and in the further provision giving to the senior claim the entire vein at and below the point of union, where two or more veins with distinct apices and embraced in separate claims unite in their course downward."

The conclusion of the court of appeals as to what constituted the vein was accepted by the supreme court as a finding of fact, which would not be disturbed, since "if the testimony does not show that it is correct, it falls to show that it is wrong."

The views of the court of appeals as to extralateral rights are quoted and endorsed by the supreme court. "To take from the discoverer a portion of that which he has discovered and give it to one who may have been led to make an adjoining location by a knowledge of the discovery and without any previous searching for mineral is manifest injustice.

"Again, as indicated in the quotation from the Court of Appeals, continuing the line of division shown upon the surface through the descending vein would be attended with great difficulty and uncertainty. Dealing with questions of this nature, a practical view must be taken. Veins do not continue of uniform width in their descent, but are often irregular and broken, and to attempt to make a division of ore according as it appears on the surface, or equally, would require the constant supervision of a court. It is not strange, then, that the custom of miners has been, as stated by the Court of Appeals, to regard and treat the vein as a unit and indivisible in point of width and belonging to the discoverer."

Webb v. American Asphaltum Min. Co., 84 C. C. A. 651, 157 Fed. 203 (1907). 8th Circ. Gilsonite and the harder forms of asphaltum in veins or lodes in rock in place may be located and patented as lodes, and not as placers. "A vein or lode is mineral-bearing rock or other earthy matter in place in a fissure in rock, so that its boundaries are sharply defined by rocky walls in place. A lode location is the location of such a lode or vein in the manner prescribed by the acts of Congress. A placer location is the location in accordance with those acts of a tract of land for the mineral-bearing or other valuable deposits upon or within it that are not found in lodes or veins in rock in place. It is a claim of a tract of land for the sake of loose deposits on or near its surface." Although the deposits specified in Rev. St. 2320 are metalliferous, the words "other valuable

deposits" used in that section are not to be so restricted. "The body of legislation, of which section 2320 and this term are a part, treats of non-metalliferous as well as metalliferous deposits, and gilsonite or hard asphaltum in a vein or lode in rock in place is one of the valuable deposits upon which a lode mining claim may be lawfully located under this section."

This conclusion is not affected by the act of Feb. 11, 1897, c. 216, which provides for the location as placers of lands containing petroleum or other mineral oils. "Asphaltum varies in its consistency from a liquid or semi-liquid to a hard or solid condition. The deposit here under consideration is gilsonite, and it is neither a liquid nor a semi-liquid, but a hard solid substance. Conceding that this and other solid forms of asphaltum may fall within the scientific and the true significance of the term mineral oils used in this act of 1897, they would not in our opinion fall within the meaning which that term would convey to the mind of a citizen of ordinary intelligence. To such a man the words convey a description of a fluid, and not of a solid substance. The act of 1897 was not enacted for scientists or for those specially learned in the composition and analysis of geological formations alone or chiefly, but for citizens of common intelligence and learning who might desire to buy valuable deposits upon the lands of the United States and to them the significance of these words 'other mineral oils' in this law, following, as they do, the word 'petroleum' which describes a liquid, is liquid or semi-liquid mineral oils."

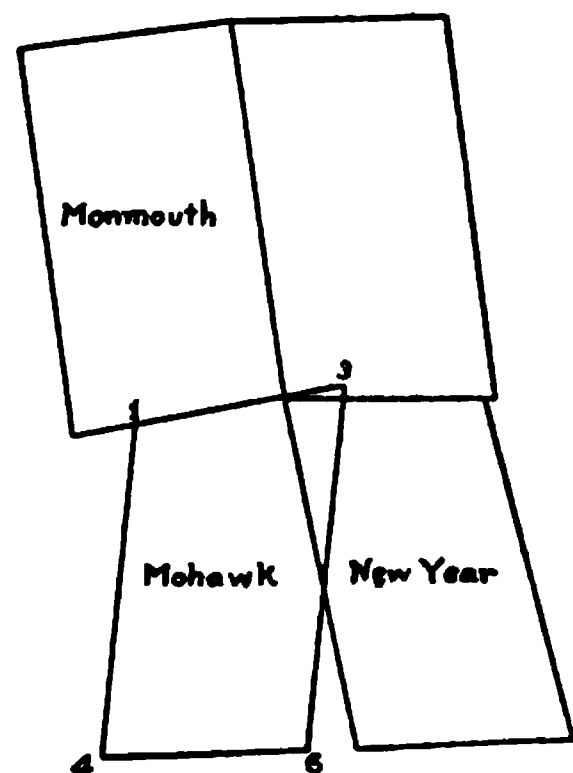
Alaska.

Alaska Gold Min. Co. v. Barbridge, 1 Alaska, 311 (1901). "While the lands below mean high tide are reserved from sale, it is believed that the law giving a party the right to follow all veins, the apices of which are within the limits of his claim, even outside of the side lines thereof, would permit him to go below the waters of the sea in following such vein, without trespassing any law of property existing in the United States."

If, therefore, one sinks shafts on tide lands, and causes an increased flow of water into, and threatens irreparable injury to, lower levels excavated by the owner of a claim on the land in following his vein beneath the sea, he will be enjoined at the suit of that owner. See this case also on page 249.

Arizona.

Allyn v. Schultz, 5 Ariz. 152, 48 Pac. 960 (1897). S. and W. located Mohawk so that its north end corresponded with south line of Mammoth. Subsequently it was shifted as shown in the diagram and monuments erected at the corners. S. and W. sold to



other parties and S. located the New Year. S. frequently pointed out the monuments 3 and 6 as defining the east line of the Mohawk, especially to A., who contemplated purchasing. A. bought the Mohawk and applied for patent. S. was estopped to deny that the lines were as indicated by the monuments 3 and 6 and his grantees are bound by this estoppel.

California.

Argonaut Min. Co. v. Kennedy Min. & Mill. Co., 131 Cal. 15, 63 Pac. 148, 82 Am. St. Rep. 317 (1900). Under the act of 1866 extralateral rights exist, although the end lines of the claim be not parallel. Where a claim was located and the title thereto acquired before the act of 1872 went into effect, the rights of the owner are governed by the act of 1866, although the patent to the land was not issued until after the passage of the act of 1872. Such an owner is entitled to extralateral rights, although his end lines are not parallel. These rights are limited by planes drawn through the lode at the end lines of the claims at right angles to the general course of the lode. This case was affirmed on other grounds in *Kennedy Min. & Mill. Co. v. Argonaut Min. Co.*, 189 U. S. 1, 47 Law. Ed. 685, above.

Southern California R. Co. v. O'Donnell, 3 Cal. App. 382, 85 Pac. 932 (1906). "It is conceded that the vein or lode within defendant's claim runs in a northerly and southerly direction, and the location was cross-wise of the vein. This being true the side lines are really end lines, considering the direction of the lode on the surface. The location is valid, but the rights of the locator are restricted to the area within the side lines three hundred feet on each side of the vein or lode."

McElligott v. Krogh, 151 Cal. 126, 90 Pac. 823 (1907). The corners of a lode claim may be located on ground already appropriated without rendering the location invalid as to so much of the ground within the boundaries as is unappropriated. It is not necessary that the side lines of the claim should be straight; there may be as many intermediate angles as may be necessary to conform the location to the extent allowed by Rev. St. 2320.

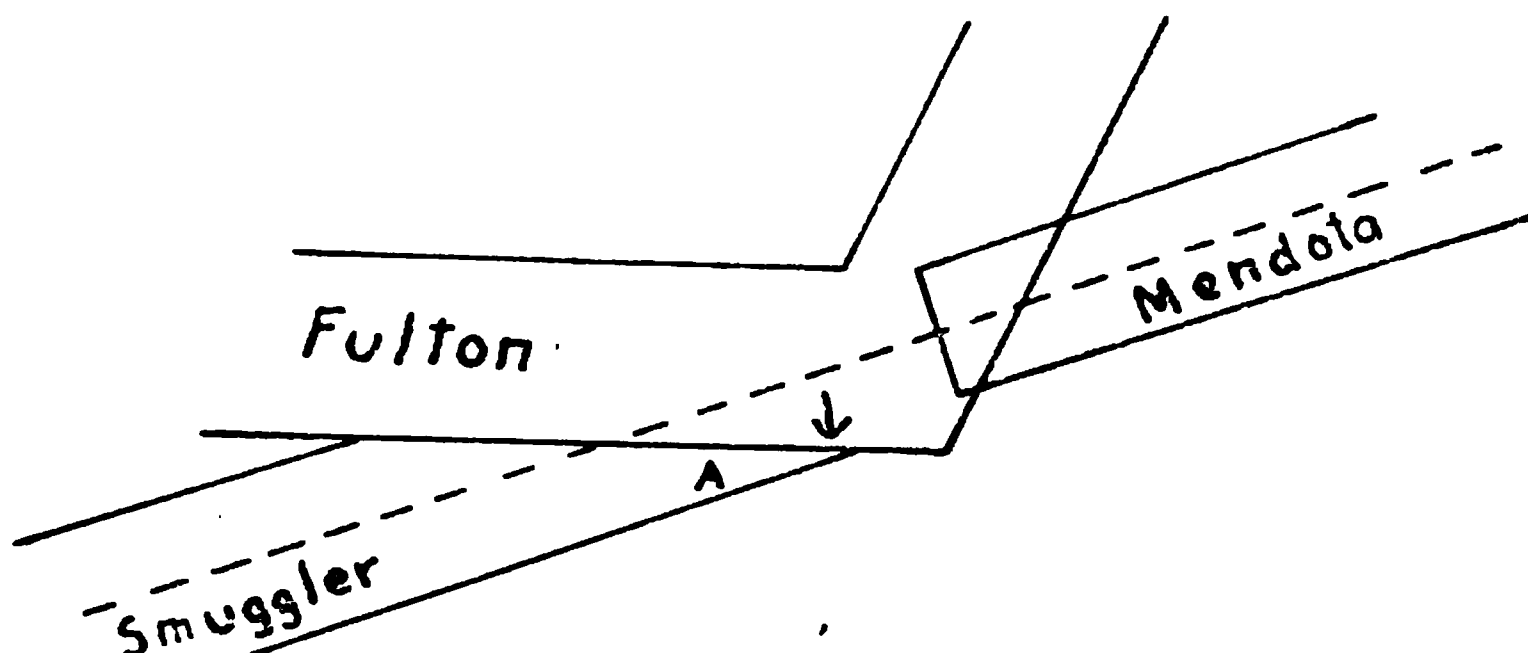
Where the vein on its strike passes outside of one of the side lines, and after continuing outside for some distance then returns within the side line, no extralateral rights are acquired as to that segment of the vein the apex of which is outside of the side line.

Riley v. North Star Min. Co., 152 Cal. 549, 93 Pac. 194 (1907). Where one conveys a part of a patented mining claim, describing it by surface lines, together with all mining right, property, possession, claim and demand whatsoever of the grantor in and to the premises, such conveyance carries all the land below the surface within vertical planes drawn through the surface lines, including that part of all veins having their apexes within the lines of the portion of the claim not conveyed which lies beneath the surface conveyed.

Colorado.

Catron v. Old, 23 Colo. 433, 48 Pac. 687, 58 Am. St. Rep. 256 (1897).

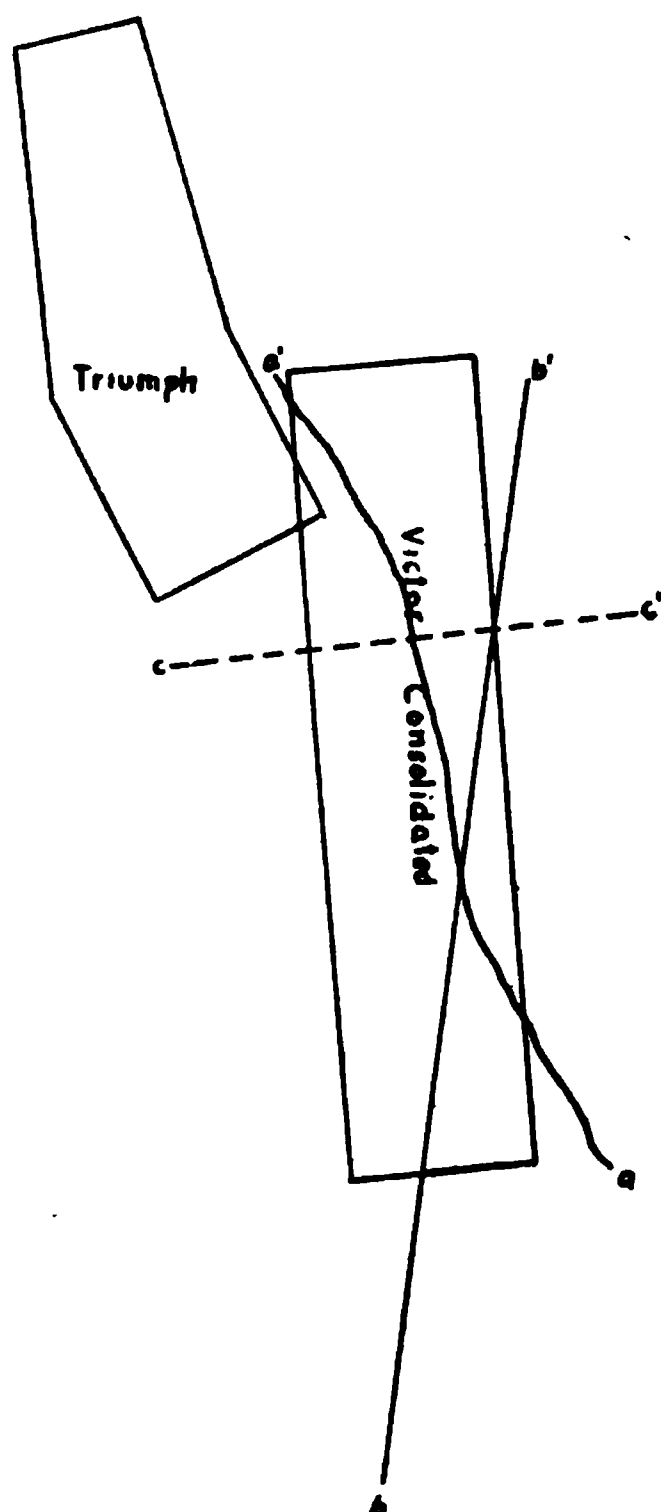
Of the claims represented on the diagram, the Smuggler belonged to the plaintiff and the Fulton and Mendota to the defendant. These claims were all patented and the question raised was whether defendant had a right to follow the vein on its dip under plaintiff's ground at A. The court held that the owner of the Fulton had no extralateral rights and consequently the defendant had not the right claimed.



Hayt, C. J., after reviewing *Min. Co. v. Tarbet*, 98 U. S. 463, 25 Law. Ed. 253; *Iron Silver Mining Co. v. Elgin Min. & S. Co.*, 118 U. S. 196, 30 Law. Ed. 98; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 30 Law. Ed. 1140; *King v. Amy & Silversmith Min. Co.*, 152 U. S. 222, 38 Law. Ed. 419; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 39 Law. Ed. 859, sums up as follows: "Therefore it may now be said that the rule is well established in cases other than horizontal veins, if the vein in its strike across the country is parallel to the side lines of a claim, the owner of the apex has the right to follow the vein to any depth in its dip beneath the surface, although in so doing he passes beyond the side lines of his claim into adjoining territory; and it is equally as well settled that when the strike of the vein is across the side lines of a claim, no extralateral rights are acquired by reason of the ownership of the apex."

Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283 (1897). It was error to charge that if the vein does not pass through both end lines the locator has no extralateral rights. That question, however, did not arise here. Defendant was entitled to have properly submitted the question whether the vein had its apex in his claim and if so whether it passed through both end lines. "If he and his grantors had prospected and developed the lode sufficiently to ascertain that so far as developed, its course and strike was substantially parallel and ran in the same direction as the side lines, he was entitled to the prima facie presumption that it continued in the same direction throughout the length of the claim."

Ajax Gold Min. Co. v. Hilkey, 31 Colo. 131, 72 Pac. 447, 102 Am. St. Rep. 23, 62 L. R. A. 555 (1903). The owner of the Victor Consolidated claimed the right to take ore within the surface lines of the Triumph upon a vein apexing in the former claim. In the diagram b b' represents the apex of the discovery vein and a a' the apex of a secondary vein. The court below



charged that if the discovery lode passed out of either side line before reaching the northerly end line, as originally located, the rights of the plaintiff to any ore outside the surface boundaries of the claim in any vein having its apex within the claim were limited to two parallel bounding planes, one drawn through the southerly end line of the claim as originally located, and the other passing through the claim parallel to said southerly end line at the point where such discovery vein may have been shown to depart from its side lines (i. e., the line *c c'*). This was held to be error.

"The owner of a lode mining claim has extralateral rights in and to all veins the top or apex of which lies within its surface lines extending downward vertically to the extent, at least, of the length of the apex within such boundaries, even though the discovery vein on its strike does not cross both end lines." It is true that where the apex of the discovery vein passes through one end and one side line, the extralateral right upon such vein will be bounded by a vertical plane drawn downward through the crossed end

line, and another vertical plane parallel thereto, but operating at the point where the apex leaves the side line. It is also true that there can be but one set of end lines for one location, and these must perform that function not only for the discovery vein, but for all other veins apexing within the surface lines. "This, however, does not mean that all such veins have exactly the same extralateral rights nor can it be said that only so much of a secondary vein as apexes within that part of the claim where the apex of the discovery vein is found has such rights." "The extralateral right depends, *inter alia*, upon the extent of the apex within the surface lines, and, while the end lines of the claim as fixed by the location are the end lines of all veins apexing within its exterior boundaries, the planes which bound such rights of different veins may be as different as the extent of their respective apices, though all such planes must be drawn vertically downwards parallel with the end lines. It makes no difference in what portion of the patented claim the apex is. Its extralateral rights under this rule can easily be ascertained. The apex of a secondary vein need not be in the same portion of the claim as is the apex of the discovery vein." "Our conclusion is that for all veins, both discovery and secondary, of a patented claim, the owner has extralateral rights, at least for so much thereof

as apex within the surface lines; that such rights as to secondary veins are not confined to such veins as apex within the same segment of the claim in which the apex of the discovery vein exists; and while the end lines of the location, as fixed and described in the patent, are the end lines of all veins apexing within the surface boundaries, and may constitute the bounding planes for such extralateral rights, and in no case can the locator pursue the vein on its dip outside the surface lines beyond such planes continued in their own direction until they intersect such veins, yet these bounding planes, which in all cases must be drawn parallel to the end lines, need not be coincident."

Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57 (1903). In an action of ejectment a complaint is sufficient which alleges a trespass on a vein apexing within the surface boundaries of the plaintiff's claim and intersected by its end lines, because, under Rev. St. 2322, a vein properly located is part and parcel of the location within which it is embraced, throughout its entire depth, within the limits defined by law, even though on its downward course it enters an adjacent location.

Where A. and B. are two adjoining locators, and A. sinks a shaft partially upon both claims, and B. allows A. to work the property through this shaft but cautioned him not to work on B.'s ground, B. is not estopped from bringing ejectment against A. for working on a vein which apexes on B.'s claim and thence dips through A.'s claim.

Under the act of 1866 the right to follow a vein upon its strike is limited by the lines of the survey purporting to embrace it. The act contemplated a location along the vein, and hence the point at which the apex of such vein in its course departs from either side line of the claim marks the point where the right to follow it on the strike under such location ceases, and extralateral rights are limited accordingly.

Where a vein, on its strike apexes within a junior location, with the exception of a few feet across the corner of an adjoining senior location, the end lines of the junior location being each some distance from this point, the junior location can take no portion of the vein apexing within the lines of the senior location, but the extralateral rights to the vein outside would be determined by the end lines actually established, in connection with the boundaries of the senior location. Subject to the qualification that no forcible entry is made, a junior locator may project the end line of his claim across the surface of a senior location for the purpose of fixing the extralateral rights to so much of the vein located as is subject to location.

If, before a claim on which a vein apexes is located, the owners of the adjoining claim work the vein on their claim and the consequent stoping out of the mineral breaks the continuity of the vein, the locator of the claim on which the vein apexes can nevertheless pursue his extralateral rights below such workings of the owners of the adjoining claim.

Big Hatchet Consol. Min. Co. v. Colvin, 19 Colo. App. 405, 75 Pac. 605 (1904). The right to follow a vein on its dip into territory belonging to another is dependent upon the full ownership of the apex, and the

departure of the vein from the side line of the owner's claim, the end lines of which must be parallel.

The end lines of a claim, for the purposes of its extralateral rights, are those laid upon the ground when it was located. The fact that one of its end lines crosses territory belonging to another and older valid location is immaterial. The line so laid is nevertheless its end line for the purpose of securing to it underground or extralateral rights not in conflict with the senior location.

Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co., 32 Colo. 176, 75 Pac. 1070, 64 L. R. A. 925 (1904). The Anchor claim (k l f e on the

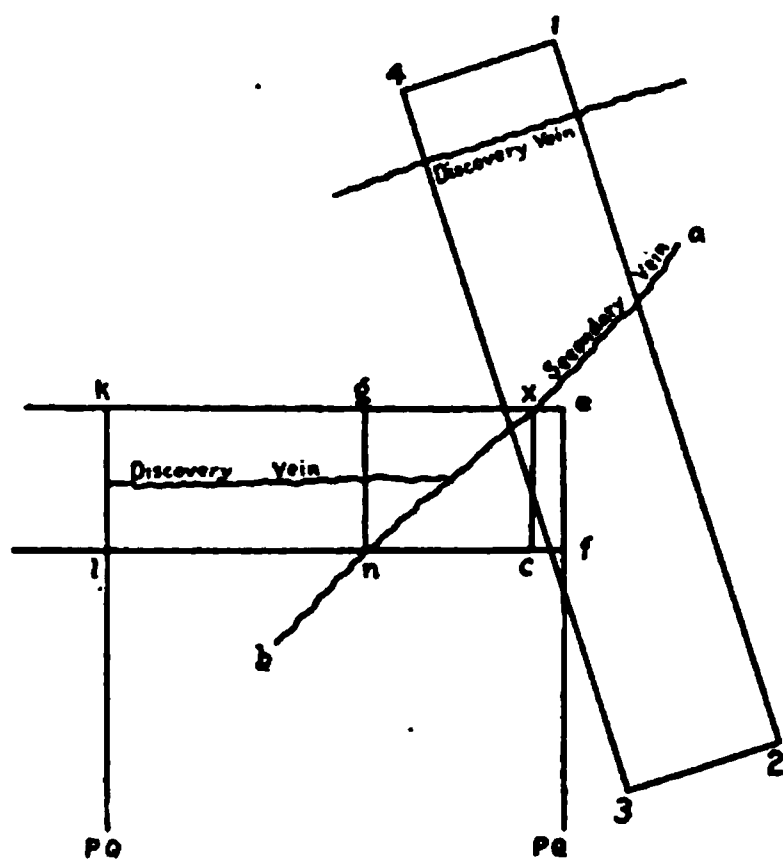


diagram) was patented before the Mattie L. (1 2 3 4 on the diagram) and without protest or adverse by the owner of the latter. It was held that the owner of the Anchor was entitled to take ore on the dip of the secondary vein beneath the rectangle f e x c.

Where two claims overlap on the surface, and the locator of one applies for and receives a patent without any adverse claim being filed by the latter, the seniority of the former is conclusively established.

Where there are two conflicting lode locations, each having a portion of the apex of the same vein, and there is a conflict with respect to the dip rights within the surface lines of the two locations, the senior location must prevail.

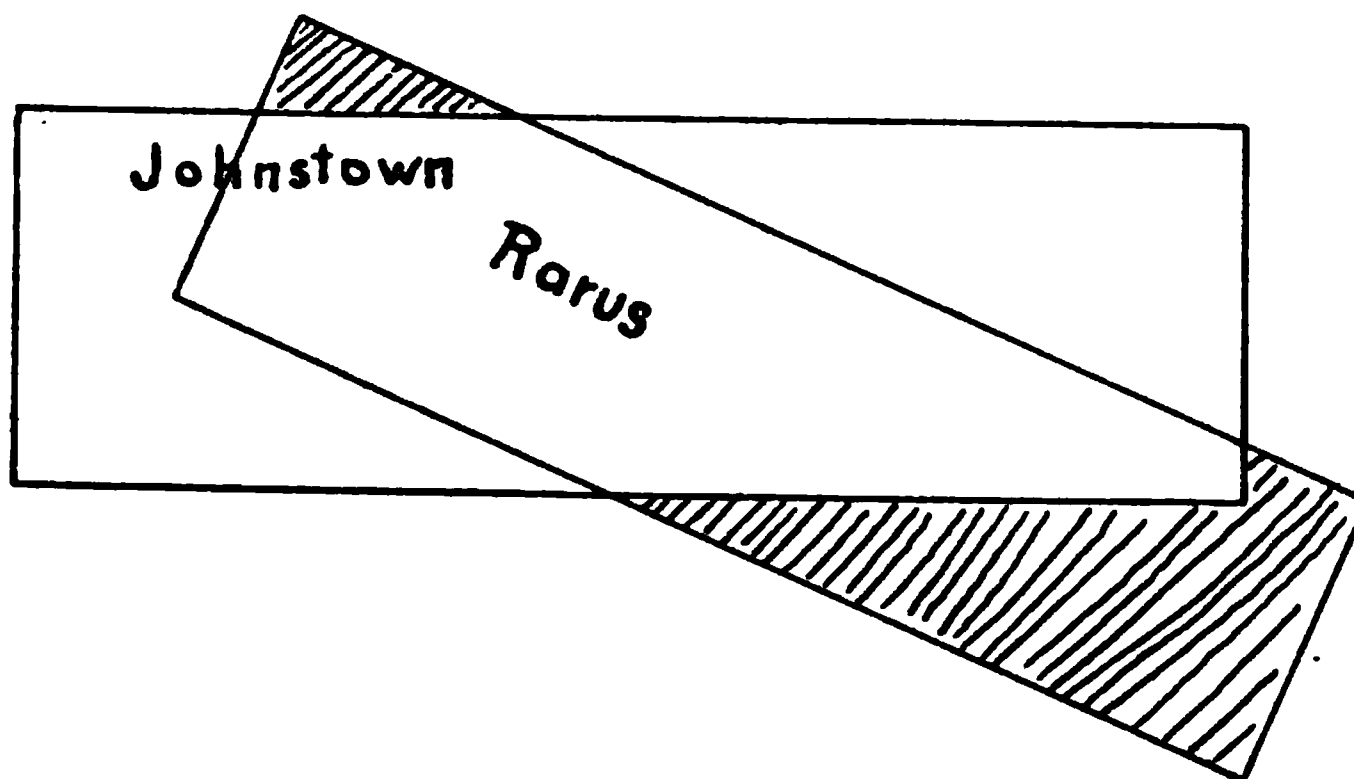
"The doctrine of extralateral rights refers to that part of a vein which, on the dip, lies outside of the side lines of the location within whose surface lines the apex of the vein appears, and not to any part of such vein, either the outcrop or segments on the dip thereof, which lie wholly within planes drawn downwards coincident with its surface boundaries. In other words, the extralateral rights of a locator of a lode mining claim do not attach until after, in pursuit of his vein on its dip, he crosses the side lines of his locaton." The doctrine of extralateral rights therefore did not apply to this case. The intraliminal rights of the parties governed, and these were determined by seniority of location. If the question had been one of extralateral rights, its determination would have been governed by *Walrath v. Champion Min. Co.*, 171 U. S. 293, 43 Law. Ed. 170 (see page 496, above), in which it was held that the legal end lines of the original discovery vein are the end lines of all veins within the surface lines with respect to extralateral rights, and the same result would be reached.

San Miguel Consol. Gold Min. Co. v. Bonner, 33 Colo. 207, 79 Pac. 1025 (1905). Where one makes a valid lode location, he is entitled to the presumption that his vein so located upon extends through the entire length

of his location, unless such presumption is overcome by a preponderance of evidence to the contrary. This doctrine is as much applicable to controversies between a lode claim and a placer location as between rival lode claims.

Montana.

Montana Ore Purchasing Co. v. Boston & M. Con. & Silver Min. Co., 20 Mont. 336, 51 Pac. 159 (1897).



The Rarus was located October 2, 1878, application for patent therefor made February 20, 1883, and patent issued June 25, 1884. The Johnstown was located January 24, 1879, application for patent made March 3, 1883, and patent issued November 15, 1884.

The patent for the Rarus, after describing the claim by its exterior boundaries, adds "containing 2.98 acres of land, more or less and embracing 1318 linear feet of the said Rarus lode, as represented by the yellow shading in the following plat." The granting clause conveys the premises "hereinbefore described as lot No. 179, etc.," "excepting and excluding all that portion of the surface ground hereinbefore described which is embraced by said lots Nos. 126, 172 and 173." 173 is the lot surveyed for the Johnstown patent, as shown in diagram. The Johnstown patent conveyed the entire surface within its exterior boundaries amounting to 18 acres.

The owners of Rarus claimed the veins whose apexes were within the original boundaries of their location without regard to the surface granted by the patent. The court held that their rights were limited by that surface ground. "While it is true that the surface of mining ground is often spoken of in the decisions of the courts as an incident to the vein whose apex lies within or under it, we are clearly of the opinion that the mining statutes of the United States contain no authority for the conveyance of the lodes or veins embraced in a located quartz claim independently of the surface ground connected with or containing or overlying them." In so far as the Rarus patent attempts to do this it is void.

Butte & Boston Min. Co. v. Societe Anonyme des Mines de Lexington, 23 Mont. 177, 58 Pac. 111, 75 Am. St. Rep. 505 (1899). The substantial fact to be proved by the lode claimant who seeks to pass outside of his side lines in following a vein "is that the vein he is pursuing is the identical vein which has its apex within his surface boundaries, and that, if it be the identical vein, the fact that its continuity has been broken is not determinative of the lack of identity, which is the test of right in such cases." "The right of an apex proprietor to pursue a vein passing from his side lines is dependent upon whether or not, as a fact, the part or mineral body of vein matter which lies outside of the perpendicular of the side lines of his surface claim is so preserved in its identity with the lode inside that it is part of the same vein, the apex of which belongs to the surface owner." By "identity" in mineral deposit is meant the same thing or the same vein. "It may be said to include a vein that is incessant. But a vein that is incessant or identical in its parts is not necessarily a vein which is continuous, in the sense that the continuity or union of its parts is absolute and uninterrupted,—in other words, though a continuity of vein does not preclude identity of vein, yet identity does not necessarily include continuity, in the exact sense just referred to." "In this discussion we do not mean to include the need of a continuity sufficient to preserve identity. The application of the rule of identity of vein should always be made so as to require the miner to trace his lode continuously, if he depart beyond his extended side lines. There must always be in any lode that 'zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.' *Eureka Consol. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 302, Fed. Cas. No. 4,548. Nevertheless there may be an identical vein, although ore is found at considerable intervals and in small quantities, if the boundaries constituting the fissure are well defined." "It becomes, then, a question of fact to be decided by the jury subject to general rules, whether there is that essential identity and continuity by which the vein can be traced through the surrounding rocks." "It may be said * * * that identity is essential, and the vein must be continuous, but its continuity may be interrupted, even to a closure of the fissure, without destruction of the identity, provided the extent of the interruptions or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact."

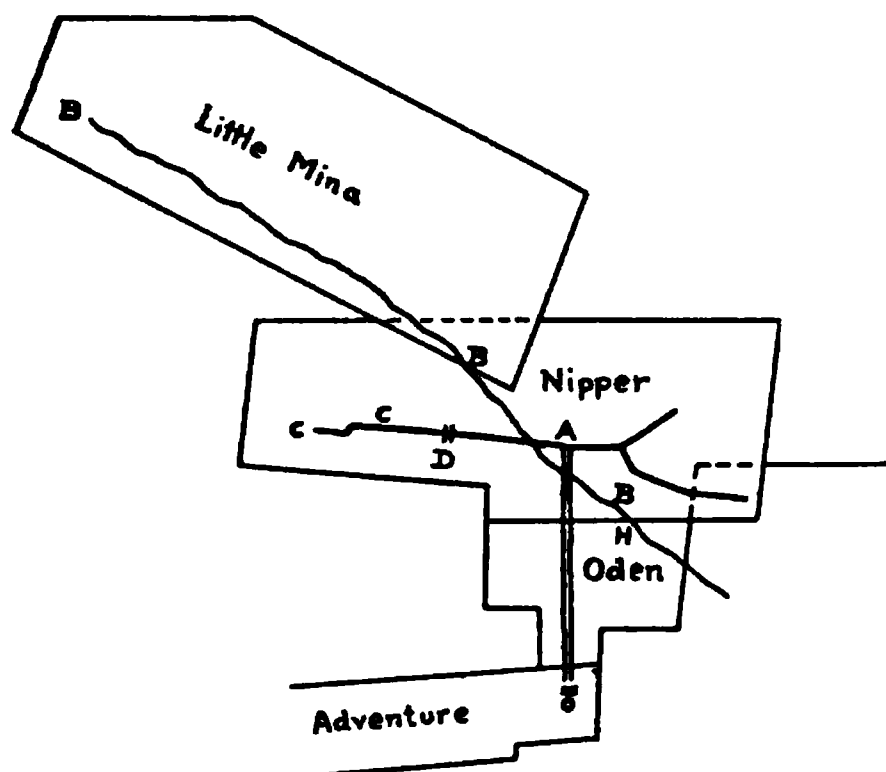
Parrot Silver & Copper Co. v. Heinze, 25 Mont. 139, 64 Pac. 326, 87 Am. St. Rep. 386, 53 L. R. A. 491 (1901). Where the apex of a vein in its course through a claim crosses both of the lines located as side lines, no matter at what angle, the latter become in law the end lines of the claim, and the owners are not entitled to any part of the vein outside of vertical planes drawn through the lines located as side lines.

Where the apex of a vein in its course through a claim crosses one of the side lines and one of the parallel end lines, the owners are not entitled to any part of the vein outside of vertical planes drawn through such end line and through a line intersecting the point at which the apex crosses such side line and running parallel to the end line crossed by the apex.

The court below having found that the Nipper vein took the course B B and crossed both side lines of that claim, its extralateral rights were bounded by vertical planes through those side lines. The extralateral rights of the Oden on this vein, if it had any, were limited by the east end line of that claim and a plane parallel thereto through H. the point at which the vein crossed the side line. The owner of neither of these claims, therefore, had any right to follow the vein beneath the surface of the Adventure; and the owner of the latter claim was entitled to ore

found on the dip of the above vein within its boundary planes and to have the owner of the other claims enjoined from mining thereon.

A grantee from the United States of mineral land is entitled to the ore in veins underlying his claim, even though the apex of such veins be in the land of another, unless the extralateral rights of such other entitle him to the ore in the vein under the land of the owner who has not the



apex of the vein. The wording of § 2322, Rev. St. U. S., that "the locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically," would seem to restrict the rights of the locator to the use and enjoyment of the surface only for the purpose of following the vein upon its strike and dip, but the use of the word "lands" in other sections of the chapter, as the subject of the grant, show that the patent grants "the fee, not to the surface and ledge only, but to the land containing the apex of the ledge." This grant differs from an ordinary grant only in that the owner has extralateral rights if the apex of the ledge is within his land, and may be subject to the extralateral rights of others if it be not. It follows that one holding under a location or patent *prima facie* is entitled to everything beneath his surface, and may prevent intrusion by any one who cannot show his right to enter thereon under the statute. (*Montana Co. v. Clark*, 42 Fed. 626, vol. 1, p. 455, is disapproved.)

State v. District Ct., 25 Mont. 572, 65 Pac. 1020 (1901). The lines of a junior location may be laid on the surface of a valid senior location, but the patent for a junior location whose lines are so laid conveys no title to the surface of any land included within the lines of the junior location, the legal title to which already has been conveyed by the government, and it conveys no title to the minerals underneath the land already conveyed unless such minerals belong to a lode which apexes on land to the surface of which the junior locator has title.

Montana Ore Purchasing Co. v. Boston & Montana Con. Coal & Silver Min. Co., 27 Mont. 288, 70 Pac. 1114 (1902), modified 27 Mont. 536, 71 Pac. 1006 (1903). The Johnstown and Rarus were both patented claims. The patent for the Rarus excluded the ground in conflict between them; and

the owner of the Johnstown conveyed to the owner of the Rarus the portion A' B C D E F. The plaintiff being the owner of the Rarus and the "conveyed portion" brought action against the defendant; who owned the Johnstown and the Pennsylvania, to quiet title to the veins which apexed in the "conveyed portion" on their dip beneath the surface of those claims. The plaintiff claimed to be entitled to these veins on their dip and along the strike between perpendicular planes, one parallel with the east line of the Johnstown at a point where the veins pass through its south side line and the other through the line E F, extended in its own direction until it meets the west end line of the Johnstown extended, and thence in the direction of that line. This claim was in accordance with the conclusion reached in *Boston & M. Consol. Copper & Silver Co. v. Montana Ore Purchasing Co.*, 89 Fed. 529 (see page 497, above). The court here, however, declined to follow that case.

"As, in a conveyance of agricultural lands or town lots, everything is presumed to be granted which is necessary to the enjoyment of the species of property, without specific description, so by a deed to a quartz claim, or a definite portion thereof, as such, everything necessary to the proper and full enjoyment of that species of property will be presumed to have been conveyed, unless there be employed specific words showing the intention of the grantor to make some reservation. Extralateral rights are not a mere incident or appurtenance, but a substantial part of the property itself, which is the subject of the grant. They are not susceptible of a more definite description than that contained in the statute, which the patent follows, because the conditions beneath the surface cannot be ascertained prior to the issuance of the patent; but we apprehend that they would pass from the government to the grantee under a patent to a quartz

claim, as such, by virtue of the provisions of the statute, even though the patent contained no express reference to them whatever. In the first deed mentioned, it was evidently the intention of the grantors to grant no less a right than they would themselves obtain under the patent which they had applied for, because the language expressly says so. They were conveying a portion of the Johnstown claim, including a definite, fixed portion of the apex of the vein along its strike. They must therefore be conclusively presumed, in the absence of words of express reservation, to have intended to convey whatever other substantial property rights were attached to such portion of the apex. The immediate grantor of the plaintiff therefore obtained all the rights which he would have obtained by a patent directly to himself. The second deed omits any reference to the veins, or the dips, spurs and angles thereof, but it is apparent therefrom that the parties were dealing with the property as quartz mining property,—that is, as a definite portion of the 'Johnstown quartz lode mining claim;' and from what has already been said, the presumption must obtain that the grantor intended to part with all his right, title, interest and estate therein, of whatever character and description. Hence the inevitable conclusion that the plaintiff is vested with the rights obtained by the patentees of the Johnstown claim, and have such rights upon the veins extralaterally, as belong to the apex embraced within the end lines of the conveyed portion.

"The fact that the end lines of the conveyed portion were fixed as they were does not, standing alone, justify the conclusion that the grantors of the plaintiff intended thereby to limit or control in any way the extralateral rights as between the grantees of the different portions of the claim."

"In the absence of any agreement, express or implied, we think the character of the property should control, and that only such extralateral rights are conveyed as appertain to the portion of the apex embraced within the boundaries of the conveyed portion, bounded by planes parallel with the end lines of the claim as patented. This theory seems to us to be entirely just, and at the same time to avoid the result that would follow from the view contended for by the plaintiff; that is, that the extralateral rights conveyed are left to depend entirely upon the subsequent ascertainment of the direction of the dip." The court accordingly fixed the west end planes in the direction of the line L M, at the points where the different veins passed through the line E F.

On rehearing, the court held that the fact that the direction of the dip of the veins was known at the time of the conveyance, taken in consideration with other circumstances, justified the conclusion "that the line E F was fixed by the parties as the utmost limit to which the rights of the grantees should extend along the strike of the veins conveyed, and that they should have all the rights thereon extralaterally which the grantors had. The portion of the veins cut off by the vertical plane along the line E F thereby became a conventional apex for the portion of the veins between the point E and the points at which they respectively cross the line F E." The decree was accordingly modified by limiting the extralateral rights of

the plaintiff by vertical planes in the direction of the line F E to the point E, and thence in the direction of E Q extended.

Maloney v. King, 30 Mont. 158, 76 Pac. 4 (1904). The owners of a mining claim are prima facie entitled to everything beneath the surface thereof, and under such prima facie title can prevent the intrusion of any one not showing a paramount right to enter within the vertical planes of their boundaries.

Heinze v. Boston & Montana Consol. Coal & Silver Min. Co., 30 Mont. 484, 77 Pac. 421 (1904), affirming 26 Mont. 265, 67 Pac. 1134. The opinion of an engineer that if a vein, having its apex in another location, continues to dip at the same angle from certain points where it is exposed in the upper levels in that location, it will enter the adjoining claim, is not sufficient to overcome the presumption that the owner of the latter claim owns the ores found beneath its surface. "This presumption is not to be overturned by speculative conjecture or even intelligent guess."

Nevada.

Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co., 27 Nev. 107, 73 Pac. 759, 103 Am. St. Rep. 759 (1903). Where the side lines of a claim as located run crosswise of the vein, the side lines become the end lines of the claim, and its owner's extralateral rights are limited to the ore within the planes of what he has located as side lines.

The right given by the statute to follow a ledge beyond the side lines of the claim is a right to follow it downward and not to follow it laterally or along its strike. "If the defendant entered upon a ledge having its apex within the exterior boundaries of plaintiff's location, and extracted ore therefrom between the planes drawn vertically downward through the end lines of said location, the right of the plaintiff to recover damages for such acts would not be affected by proof merely that the place from which such ore was extracted could be reached by going continuously through ledge matter from a ledge having its apex within the exterior boundaries of a prior location belonging to the defendant. In order that such proof should avail the defendant, it must further appear that such passage from the apex of defendant's ledge is made continuously downward on the dip of that ledge; and if any portion of such passage must necessarily be made either upward or laterally along the strike, then the plaintiff's right to recover is not affected." If there were two ledges which united on their dip, the fact that one could be reached in ore or ledge matter from the other below the point of union does not prove that they are one ledge above that point.

Golden v. Murphy, 27 Nev. 379, 75 Pac. 625 (1904). "If small pieces of quartz, narrow seams, and little pockets of ore embodied in porphyry be deemed sufficient to sustain a location, we do not understand that they give the owner any greater rights against veins apexing on other claims dipping under this ground than he would have if his location were based upon a substantial and well-defined ledge. In either case he would be entitled to

all veins which apexed within the boundaries of his claim, and in neither would he have any right to those existing between walls apexing in the locations of other claimants, on the theory applied to blanket ledges, and also prevailing in regard to others under the civil law."

Golden v. Murphy, 103 Pac. 394 (1909). Counsel contended that no extralateral right can legally exist through a mineralized hanging and footwall formation which is sufficiently mineralized to sustain a mining location and to induce the miner and prospector to expend his time and money in exploration thereof, even though experts detect walls to any formation which they call an independent vein coursing through such mineralized formation. They fail to distinguish between what is sufficient in law to constitute a discovery and what constitutes a vein. It cannot be said that a vein containing valuable ore and having well defined walls, which are a part of a mineralized zone, carrying small values, but which are sufficient to support a location, cannot be regarded as distinct from the mineralized zone.

What value the filling of the vein should have is a matter not devoid of difficulty, and no standard has or probably ever will be devised.

"It must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character as to boundaries of the vein itself. If the country rock or the general mass of the mountain outside of the limits of the vein is wholly barren, slight values of the vein material would seem to satisfy the law; but if on the other hand the rock of the district generally carries values, then undoubtedly the values in the vein material, where the boundaries of the vein are not well or not at all defined, either on the surface or at depth, should be in excess of those of the country rock, else there can be no line of demarcation, nor, where the rock is generally broken, shattered and fissured, anything to separate it from the adjacent country. Values, therefore, of the filling of a vein must be considered with special reference to the district where the vein or lode is found."

"The mineral zone in question in this case is described as country rock cut by a series of independent ledges of an approximately parallel dip, any one of which ledges has its entire system of walls. Within this country rock, comprising the mineral zone, at 'wide intervals, as you would find in the bedding and cracks of any rock,' are found 'quartz seamlets.' The fact that the Canyon ledge passes through a mineral zone of this character does not, we think, make it an inseparable part of the general mass of rock comprising the zone, but upon the contrary, it may be regarded separate and distinct therefrom and may be followed upon its dip."

Utah.

Hayes v. Lavagnino, 17 Utah, 185, 53 Pac. 1029 (1898). Geologists, when accurately speaking, apply the terms "vein" and "lode" to a fissure in the earth's crust filled with mineral matter. But "the practical miner has paid

little attention to the scientific definitions of these terms. As to the term 'lode', it has been said that the miners made the first definition, and that as used by them, before defined by any authority, it simply meant whatever they could follow, expecting to find ore,—that formation by which a miner could be led or guided. This is implied by its derivation; the term being a variation of the verb 'lead'. The word 'vein', with the miner, means practically the same thing. By him the two terms are used, interchangeably or together, to mean some formation within which, or following which, he can find ore, and outside of which he cannot expect to find it. The fissure, therefore, and its walls are of importance, in the business of mining, only as defining the boundaries within which miners may reasonably expect to find ore."

Strickley v. Hill, 22 Utah, 257, 62 Pac. 893, 83 Am. St. Rep. 786 (1900). Although when adjoining owners and their predecessors in interest occupy land to a given line, and treat such line as a boundary between their respective lots for 20 years, neither can thereafter claim beyond such line; and although a parol agreement long acquiesced in, to settle a boundary between adjoining owners, being the result of an honest attempt to fix the true boundary line, according to which the parties and their predecessors have actually occupied, and made improvements with reference thereto, though the time has not been sufficient to establish a bar under the statute of limitations, will work an estoppel, yet a recent parol agreement between parties fixing the boundary line between unpatented mining claims is void under the statute of frauds, and, under the circumstances shown, could not bind the government.

Grand Central Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 Pac. 648 (1905). There is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he will be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits belong to another lode having its apex elsewhere.

One who claims extralateral rights has the burden of proving not only that the apex and strike of the vein are within the boundaries of his claim but that between planes drawn vertically downward through his end lines the vein from its apex on its dip is continuous, that the continuity extends to and through the contestant's ground and that the ore bodies claimed form a part of such vein.

A patent to a mining claim raises a conclusive presumption that there is an apex of a vein within the patented ground; but there is no presumption that it is the apex of the vein in dispute, or that such vein embraces ore outside the side lines of the claim.

"In all these definitions (of a lode in the Eureka Case, *Iron Silver M. Co. v. Cheesman*, and *U. S. v. Iron Silver M. Co.*, see vol. 1, pp. 445, 450, 487), the essential elements of a vein are mineral or mineral bearing rock and boundaries, and no doubt, when one of these elements is well established, very slight evidence may be accepted as to the existence of the other. It would seem, therefore, that where one claims extralateral

rights under the acts of Congress, because of a vein existing and apexing in his ground, but which has no well defined boundaries, he, when his claim is controverted, must, in order to exercise such rights, show a ledge or body of mineral or mineral bearing rock of such value as will distinguish it from the country rock, or from the general mass of the mountain. The material must in texture and value be such as to show the existence of a vein, and the mere fact * * * that the rock is broken, shattered, and fissured and mixed with calcareous substance, although it may show a conglomerate mass does not establish, in the sense of the statute, a vein. When, however, the walls or boundaries are well defined, the vein differentiated from the adjacent country, and the kind of material mentioned constitutes the filling, evidence of slight value in mineral will, it seems, be sufficient.

"It is insisted for the appellant, however, that a 'lode, within the meaning of the statute, is whatever the miner can follow with a reasonable expectation of finding ore'; that, though he sees no ore, yet, if he sees gangue and vein matter, he discovers the lode; and that whatever material would be sufficient to render valid a location thereon would be sufficient evidence of apex to justify one in following therefrom downwards, beyond the side lines of the location, in the same kind of material, to and beneath the surface of his neighbor's property. We do not thus interpret the law. What may constitute a sufficient discovery to warrant a location of a claim may be wholly inadequate to justify the locator in claiming or exercising any rights reserved by the statutes. What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex, to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to an adjoining owner. The question of a sufficient discovery of a vein, or of the validity of a notice of location, upon which the cases cited by the appellant on this point are authority, is substantially different from one relating to the continuity of a vein on its dip from the apex, and which tests the rights of the undisputed owner of the surface to what lies underneath and within his own boundaries. It is the object and policy of the law to encourage the prospector and miner in their efforts to discover the hidden treasures of the mountains, and therefore, as between conflicting lode claimants, the law is liberally construed in favor of the senior location; but where one claims what prima facie belongs to his neighbor, because of an apex in the claimant's location, a more rigid rule of construction against the claimant prevails, and, as we have already observed, he has the burden to show, not merely that the vein on its dip may include the ore bodies in the adjoining ground, but that in fact it does so include them. Until he establishes such fact beyond reasonable controversy, he has no rights outside his side lines in another's ground."

"Reverting to the characteristic of a vein or lode, appearing from the definitions above quoted, that its filling must consist of a body of mineral or mineral bearing rock, what value such material should contain is a

matter not devoid of difficulty, and no standard of value applicable to all such cases has yet, and probably never will, be devised. It must necessarily depend upon the characteristics of the district or country in which the vein or lode in any particular instance claimed to exist is located, and upon the character, as to boundaries, of the vein itself. If the country rock, or the general mass of the mountain outside of the limits of the vein, is wholly barren, slight values of the vein material would seem to satisfy the law; but if, on the other hand, the rock of the district generally carries values, then undoubtedly the values in the vein material, where the boundaries of the vein are not well or not at all defined, either on the surface or at depth, should be in excess of those of the country rock, else there can be no line of demarcation, nor where the rock is generally broken, shattered and fissured, anything to separate it from the adjacent country. Values, therefore, of the filling of a vein, must be considered with special reference to the district where the vein or lode is found. It is likewise as to a definition of a vein or lode."

LAND OFFICE DECISIONS.

The ruling in *Silver Queen Lode*, 16 L. D. 186 (see vol. 1, p. 472), does not govern a case in which a conflicting patented placer does not intersect the lode claim, but extends unto the lode claim and intersects the apex of the lode. In such a case, where the vein dips out of the placer ground, the apex for the purposes of discovery and purchase is that portion of the vein which would constitute its actual apex, if it had no existence in the placer ground. *Woods v. Holden*, 26 L. D. 198 (1898), affirmed 27 L. D. 375 (1898), 28 L. D. 24 (1899).

A lode location based on a discovery on one side of an intersecting mill site is not good as to the ground on the other side of said mill site. The latter is presumed to be nonmineral and the lode is consequently presumed not to extend through it. *Mabel Lode*, 26 L. D. 675 (1898).

A junior lode location is not invalidated because its end lines and corners are laid within or upon the surface of a senior valid location (*Del Monte Min. Co. v. Last Chance Min. Co.*, 171 U. S. 55, 43 Law. Ed. 72). *Hallett & Hamburg Lodes*, 27 L. D. 104 (1898).

Entry will be allowed of two overlapping claims, located and held by the same party and resting on separate discoveries of parallel veins, although the discovery in the junior location was made within the limits of the senior location, where the overlap is excluded from the survey of the latter. The later location will be treated as an abandonment of the earlier to the extent of the overlap. The rule that a location based on a discovery within the limits of a prior existing valid location is void is not applicable where both locations are made by the same person. *Golden Link Min. Leasing & Bonding Co.*, 29 L. D. 384 (1899).

Application for patent for a lode claim will not be allowed where the claim is divided into two parts by an intersecting patented mill site. But

the applicant will be given the privilege of electing which part he will retain by showing a discovery thereon and the necessary expenditure thereon. *Paul Jones Lode*, 28 L. D. 120 (1899). (But see 31 L. D. 359, below.)

As to fraction caused by intersecting lode claims, see *Hidden Treasure Lode*, 29 L. D. 156, on page 414, above.

The end line of a survey of a lode claim may be laid upon the surface of a prior location in order to hold land embraced within the lines of a valid location, but in case the prior location is excluded the end line may not be placed beyond the point where the lode in its onward course or strike intersects the exterior boundary of the excluded ground. *Stranger Lode*, 28 L. D. 321 (1899).

In view of the decision in *Del Monte Mining & M. Co. v. Last Chance Min. & M. Co.*, 171 U. S. 55, 43 Law. Ed. 72, the department will no longer enforce the requirement that, where the lode intersects the exterior boundary of a prior valid claim, the end line must not be established beyond such intersection. The lines of the claim may be laid out upon the surface of a valid senior location, and the locator will be entitled to patent for all of the land included in his lines, excepting therefrom the senior locations. *Hustler v. New Year Lode Claims*, 29 L. D. 668 (1900).

The decision in the *Del Monte* case is extended by the department to cases where the senior locations have been patented. The lines of a claim may be laid out within, upon or across the surface of patented lode claims for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing therein, and of defining and securing extralateral rights upon such veins. "The location or survey lines of a claim are not in themselves any part of the claim or property for which a patent is sought, but are only used to describe, define and limit property rights in the claim. What matters it then to the government, in the issue of patent, where the lines of a lode location have been placed, so long as no property belonging to another is claimed, and the property to be patented is accurately described, and the lines do not embrace any larger area of surface, claimed and excluded, than the law permits, and if laid within, upon or across private land, the same was done openly and not contrary to the will and rights of the private owner?" *Hidee Gold Min. Co.*, 30 L. D. 420 (1901).

The lines of a claim may be laid within, upon or across not only patented lode claims, but also patented agricultural lands, for the purpose and subject to the conditions stated in the last case above. *Alice Lode Min. Claim*, 30 L. D. 481 (1901).

Where a valid location of a lode mining claim has been made, the subsequent exclusion by the locator from his entry of a conflict with a placer location does not constitute a waiver by the locator, in the absence of other evidence, of its right to the entire surface not excluded and to extralateral rights to any veins apexing therein. *Vulcano Lode Min. Claim*, 30 L. D. 482 (1901).

The mining statutes do not contemplate that vein or lode deposits may be located and patented independently of the surface ground connected with and containing or overlying them. An exception from a patent of surface ground excepts also all veins or lodes beneath such surface having their tops or apexes within the vertical lines thereof (*Montana Ore Purchasing Co. v. Boston & Montana Consol. Copper & Silver Min. Co.*, 20 Mont. 336, 51 Pac. 159, followed). *Lellie Lode Min. Claim*, 31 L. D. 21 (1901).

It follows from the decision in *Alice Lode Mining Claim*, above, that an application for patent to a lode mining claim may embrace ground lying on opposite sides of an intersecting patented mill site, provided the lode upon which the location is based is actually discovered in both parts of the claim. *Paul Jones Lode*, 31 L. D. 359 (1902), modifying 28 L. D. 120, above. (A result of this case is to overrule *Michael Howard*, 15 L. D. 504, vol. 1, p. 472.)

A location based upon a discovery upon the dip of a vein whose apex lies within the lines of a prior claim is invalid. The land department has jurisdiction to inquire whether a claim for which application for patent has been made is based upon such a discovery. The question having been raised by protest to the application, it is the duty of the department to determine it. "The question is not one within the exclusive jurisdiction of the courts. Controversies committed to the courts for determination are those between adverse claimants to possession under conflicting locations of the same land, and those only. This is not such a case." *Bunker Hill & Sullivan Min. & Concentrating Co. v. Shoshone Min. Co.*, 33 L. D. 142 (1904).

Where a claim is located upon a blanket vein, the lode line may not be extended in a zigzag form so as to make the distance between the side lines exceed six hundred feet. The claim here was located so that one end line was over 800 feet long and the other two-tenths of a foot and a large part of the claim more than 600 feet wide. An amended survey was ordered so that the end lines might be established according to law and the width reduced to the legal limits. "Neither of these lines can be considered an end line within the meaning of the statute. As vein or lode claims may not be located to exceed six hundred feet in width, it is manifestly not within the contemplation of the statute that an end line in case of a blanket vein, such as is here involved, may exceed that distance in length." "The end lines, required in all cases to be parallel to each other, are important features of a vein or lode location, and the statute clearly contemplates that such lines shall have substantial existence in fact and, in length, shall reasonably comport with the width of the claim as located." *Jack Pot Lode Min. Claim*, 34 L. D. 470 (1906); *Belligerent & Other Lode Min. Claims*, 35 L. D. 22 (1906).

"That the course of a vein or lode as actually found to exist in the earth, either by its outcrop at the surface or by exploration beneath the surface, may rightly control or determine the manner of the location, within the prescribed limitations as to length, width and end lines, there can be no doubt; and in order to conform the location to the actual course of the

vein or lode the side lines may be irregular, and the location is not required to be in any particular form except that the end lines must be straight and parallel to each other. But it does not follow that a locator upon what is known as a blanket vein, where the ore body covers the entire area within the limits of the side and end lines, and the apex of the vein is therefore to be regarded as co-extensive with the space between the side lines, and every part or point of such apex as much the middle of the vein as any other part, may assume, contrary to the fact, that an apexing vein exists in certain portions of his claim as distinguished from other portions, and that the course of such vein runs in such irregular and zigzag manner as best to suit his purposes in laying the side and end lines of his location, whatever such purposes may be." *Belligerent & Other Lode Min. Claims*, 35 L. D. 22 (1906).

An end line must be in a straight line. It may not contain an angle so as to conform to the lines of other claims upon which it abuts. *Pilot Hill & Other Lodes*, 35 L. D. 592 (1907).

"While the law grants to the locator and owner of a vein or lode the right to follow such vein or lode on its dip outside the vertical side lines of his location, no right is granted him to use the sub-surface of such outside ground, when owned or claimed by another, for the purpose of exploring, reaching or developing other claims." *Patten v. Conglomerate Min. Co.*, 35 L. D. 617 (1907).

Sandrock or sedimentary sandstone formation in the general mass of a mountain bearing gold is rock in place bearing mineral and constitutes a vein or lode within the purview of the statute, and can be located and entered only under the law applicable to lode deposits. It cannot be lawfully appropriated or patented under those portions of the statute which apply to placer claims. *E. M. Palmer*, 38 L. D. 294 (1909).

A valuable deposit of onyx, occupying a well defined fissure with clearly marked hanging and foot walls, and well defined strike and dip, is subject to location under the lode mining law (*Webb v. American Asphaltum M. Co.*, 157 Fed. 203, followed). *Utah Onyx Development Co.*, 38 L. D. 504 (1910).

B. Cross and Uniting Veins.

p. 472.

United States.

Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 182 U. S. 499, 45 Law. Ed. 1200 (1901), affirming 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 (1899). The Ajax Company owned two patented lode claims, the Mammoth Pearl and Monarch, adjacent and substantially parallel. The Calhoun Company owned the Victor Consolidated, a patented lode claim the side lines of which intersected the side lines of both the Mammoth Pearl and Monarch. The Victor Consolidated vein extended throughout

the entire length of that claim and on its strike crossed the veins of the other two claims. The latter claims were located prior to the Victor Consolidated, and the patents therefor were issued prior to the patent for the Victor Consolidated.

It was held that the Ajax Company was entitled to so much of the Victor Consolidated vein as was within the lines of the Mammoth Pearl and Monarch and could recover from the Calhoun Company for ore taken by it from that vein within those lines.

The state court, after expressly overruling *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669 (see vol. 1, page 475), and deciding that the words "space of intersection" when applied to the facts of this case mean intersection of the claims, said: "Our conclusion is that the provisions of sec. 2336 apply to locations made under the act of 1872, as well as before, refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection, in determining the ownership of ore within such space, means either intersection of veins or conflicting claims, according to the facts of each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause and part of each and in so far as sec. 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of sec. 2322."

In the federal court McKenna, J., states the question involved thus: "Third, whether or not plaintiff in error is the owner and entitled to the ore contained in the vein of its Victor Consolidated Claim, within the surface boundaries and across lode claims of defendant in error." He then says: "The third proposition involves the relation of sections 2322 and 2336. * * * It presents for the first time in this court the rights of a junior location of a cross vein within the side lines of a senior location under section 2336. Prior to the decision by the Supreme Court of Colorado in the case at bar that court had decided that the junior location was 'entitled to all of the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins.' *Branagan v. Dulaney*, 8 Colo. 408, 8 Pac. 669; *Lee v. Stahl*, 9 Colo. 208, 11 Pac. 77; *Morgenson v. Middlesex Min. & Mill. Co.*, 11 Colo. 176, 17 Pac. 513; *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436. In *Coffee v. Emigh*, 15 Colo. 184, 25 Pac. 83, it was held that the rule laid down in the foregoing cases had become established law. The claims of the plaintiff in error were located after the decisions, and it is contended that the rule laid down by them became a rule of property in the State, and it is earnestly urged that to reverse the rule now would take from plaintiff in error that which it 'had reason to believe was a vested right in the Victor Consolidated vein.'

"There are serious objections to accepting that consequence as determinative of our judgment. We might by doing so confirm titles in Colorado but we might disturb them elsewhere. The statute construed is a Federal

one, being a law not only for Colorado, but for all the mining States, and, therefore, a rule for all, not a rule for one, must be declared. Besides, what consideration should be given to prior cases, the Supreme Court of the State was better able to judge than we are. It may be that the repose of titles in the State was best effected by the reversal of the prior cases. At any rate, a Federal statute has more than a local application, and until construed by this court cannot be said to have an established meaning. The necessity of this is illustrated, if it need illustration, from the different view taken of sections 2322 and 2336 in California, Arizona and Montana, from that taken in the prior Colorado cases. The Supreme Courts respectively of those States and that Territory have adjudged a superiority of right to the cross veins to be in the senior location. Manifestly, on account of this difference if for no other, this court must interpret the sections independently of local considerations. And in doing so we do not find in the sections much ambiguity so far as the issue raised by the record is concerned; indeed, not even much necessity for explanation. Section 2336 does not conflict with section 2322, but supplements it. Section 2336 imposes a servitude upon the senior location, but does not otherwise affect the exclusive rights given to the senior location. It gives a right of way to the junior location. To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the Supreme Courts of California, Arizona and Montana, or through the space of intersection of the claims, as held by the Supreme Court of Colorado in the case at bar. It is not necessary to determine between these views. One of them is certainly correct, and therefore the contention of the plaintiff in error is not correct, and more than that it is not necessary to decide on this record. A complete interpretation of the sections would, of course, determine between those views, but on that determination other rights than those submitted for judgment may be passed upon, and we prefer therefore to reserve our opinion." (See 3 M. A. S., § 3142.)

II. PLACER CLAIMS.

p. 476. The locator of a placer claim must not project his lines across ground included within existing claims, nor place his corners upon ground already appropriated by others. The doctrine of *Del Monte Min. Co. v. Last Chance Min. Co.* (page 492, above) is not applicable to placer locations. That decision arose from the necessity of preserving extralateral rights to the locators of irregular fractions, and can have no reference to locations as to which questions of extralateral rights cannot arise. The placer locator can run his lines along the lines of adjacent claims without curtailing any rights derived from his location

and he must therefore do so. The law requires him to conform to the public surveys and the rectangular subdivision thereof, but he is excused from a strict compliance with this requirement when that is impracticable. Such impracticability exists where compliance would necessitate the placing of his lines upon other prior located claims. (See L. O. Regulations 30.) The latest definition of the conformity required by the statute is found in *Snow Flake Fraction Placer*, 37 L. D. 250, below.

While it has been finally decided that a single discovery is sufficient to hold a placer claim of whatever size, the mineral character of the entire tract claimed is not thereby conclusively established. Inquiry may still be made into the character of any part thereof, and if such a part amounting to a legal subdivision is shown to be nonmineral, it will be excluded by the land department from the entry. And it also follows that the placer location does not prevent the appropriation of such subdivision by others as being nonmineral.

United States.

Webb v. American Asphaltum Min. Co., 84 C. C. A. 651, 157 Fed. 203 (1907). 8th Circ. See this case on page 508, above.

Stenfjeld v. Espe, 171 Fed. 825 (1909). 9th Circ. A large number of placer claims had been validly located so as to leave irregular, intervening and noncontiguous fractions, which were unlocated. In order to embrace these noncontiguous fractions the plaintiffs located an association placer claim, laying the lines across the surface of the previous locations. This did not amount to an appropriation which precluded subsequent locations of the fractions referred to. Rev. St. 2330 authorizes an association location of contiguous claims only. Claims not contiguous may not be joined in a single location.

The ruling in *Del Monte Min. & M. Co. v. Last Chance Min. & Mill. Co.*, 171 U. S. 55, 43 Law. Ed. 72 (see page 492, above), is based upon considerations which have no application whatever to placer locations. In the placer mine the surface is the thing located, and the possession of the surface is absolutely essential to the mining operations. In order to obtain the surface that is open to location, there is no necessity to invade the surface of other claims or to place boundary lines thereon. The decision in *Rialto No. 2 Placer Min. Claim*, 34 L. D. 44, is not assented to. The defendants found the land in controversy unmarked and unoccupied, surrounded by other valid claims. They had the right to assume that it was vacant and unappropriated. It would be an intolerable burden if the prospector who finds such an unoccupied parcel of land were required to search the surrounding country to ascertain whether the locators

of an association claim had placed four posts a half mile distant from each other with the intention of appropriating segregated fractions of land lying between the boundaries of existing claims.

California.

McCann v. McMillan, 129 Cal. 350, 62 Pac. 31 (1900). It is immaterial that a deposit of borax is improperly located as a lode claim instead of a placer claim, because the same acts are required to be performed in either case, and a valid location of a lode claim, therefore, would be also a valid location of a placer claim.

Cranes Gulch Min. Co. v. Sherrer, 134 Cal. 350, 66 Pac. 487, 86 Am. St. Rep. 279 (1901). Under the act of Congress of July 9, 1870, a placer patent could contain no reservations, and the patentee was entitled even to known lodes therein. These are excepted from placer patents under the act of 1872. See this case also on page 422.

Kern Oil Co. v. Crawford, 143 Cal. 298, 76 Pac. 111, 3 L. R. A. (N. S.) 993 (1903). See this case on page 295.

Mitchell v. Hutchinson, 142 Cal. 404, 76 Pac. 55 (1904). Placer claims are required to conform to the lines of the public survey only where such conformity is reasonably practicable; it is sufficient if they conform to such lines as nearly as is reasonably practicable. Nonconformity was excused where the claim covered an old river channel, and in order to take in this channel, which was valuable for minerals, and not include ground of no value for mining purposes, the location could not conform to the lines of the public survey, but did conform as nearly as practicable to accomplish that object.

Weed v. Snook, 144 Cal. 439, 77 Pac. 1023 (1904). Where one has located an 80 acre placer claim on which he had discovered oil, he cannot avail himself of such discovery for the purpose of making a consolidated filing upon these 80 acres and an adjoining 80 acres upon which he had made no discovery, but upon which another was in possession prospecting for oil.

Colorado.

McConaghy v. Doyle, 32 Colo. 92, 75 Pac. 419 (1903). Where a lode claim is abandoned prior to the application for a patent for a placer claim covering the same tract of land, but no mineral had been disclosed in any vein upon the lode claim which would justify expenditure for the purpose of extraction, the fact that there was once such a lode location does not affect the rights of the applicant for the placer patent.

LAND OFFICE DECISIONS.

"But one discovery of mineral is required to support a mining location under the placer laws whether it be of twenty acres by an individual or

of 160 acres or less by an association of persons." *Union Oil Co.*, 23 L. D. 222, reversed, and *Ferrell v. Hoge*, 19 L. D. 568, overruled. (See vol. 1, p. 482.) *Union Oil Co.*, 25 L. D. 351 (1897).

Decision in *Hayden v. Jamison*, 24 L. D. 403, vacated (see 16 L. D. 537, vol. 1, pp. 201, 545). Sandstone is a mineral and lands chiefly valuable for deposits of sandstone were subject to location as placer even before the act of Aug. 4, 1892. *Hayden v. Jamison*, 26 L. D. 373 (1898).

Land chiefly valuable for building stone is subject to location as a placer claim, and such a location precludes the sale thereof to a subsequent applicant under the stone and timber act of June 3, 1878. *Forsythe v. Weingart*, 27 L. D. 680 (1898).

One discovery is sufficient basis for a placer location of 160 acres by an association. "But if it is shown that any area amounting to a legal subdivision does not contain or is not valuable for the deposit for which the location was made, it is competent for this to be shown by the protestants." The burden of proof is on the latter. *Ferrell v. Hoge*, 27 L. D. 120 (1898).

"While a single discovery is sufficient to authorize the location of a placer claim, and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto." Where a part of the ground included in a placer entry, in this case 20 acres, is shown to contain no valuable mineral deposits, it will be excluded from the entry. *Ferrell v. Hoge*, 29 L. D. 12 (1899).

The rule that the lines of a location may be laid, for certain purposes, within, upon or across the surface of other claims, does not give such right when the claims whose surface thus is included within the lines of the subsequent location have been patented or entered under the public land laws; and a placer location, parts of which are separated by intervening patented or entered claims, cannot be applied for as one claim, but each noncontiguous part must be treated as a separate claim. *Grassy Gulch Placer Claim*, 30 L. D. 191 (1900).

An entry for a placer patent will be held for cancellation, because in shape totally at variance with the United States system of public land surveys, when it is composed of two large tracts three miles apart, connected by a strip of land from thirty to fifty feet wide, and there is not sufficient evidence to show the necessity for so peculiar a shape. *Miller Placer Claim*, 30 L. D. 225 (1900).

The provision of Rev. St. 2331 as to conformity as near as practicable with the United States system of public land surveys applies to all placer claims, whether on surveyed or unsurveyed land. Upon unsurveyed land such locations should be rectangular in form with east, west, north and south lines. An exception on the ground of impracticability is made in the case of "gulch" placers, laid upon and along the bed of a stream, whose banks are enclosed or surmounted by precipitous cliffs, barren of

mineral, where the claims embrace substantially the area between and practically follow the base lines of the enclosing walls or cliffs.

In such cases, a full and explicit report, touching the situation and scope of the claim or claims involved and the physical or topographical conditions surrounding them, which are relied upon to bring them within the principle applicable to "gulch" placers, should be required of the deputy mineral surveyor who makes the survey, to be verified under the certificate of the surveyor general. *Wood Placer Min. Co.*, 32 L. D. 363, 401 (1903).

A placer claim of 120 acres, for which an application for patent was made, consisted of two tracts connected by three other ten acre tracts, each being square and lying in a diagonal row, cornering with each other and with the larger bodies. The department refused to entertain this as an application for a single claim. "The limits of a mining claim are defined by its exterior boundary lines. Tracts which merely corner with each other have entirely separate limits and boundaries. But one discovery of mineral is required to support a placer location; and since such discovery is confined by the language of the statute to the 'limits of the claim'—clearly contemplating what may be embraced within one set of boundary lines—it is evident that a claim may not legally be taken in such form as to make necessary two or more sets of boundary lines, defining separate limits. There is no provision of the mining laws authorizing a locator, by virtue of a discovery of mineral within the limits of one parcel of ground, to embrace in his location another and entirely different parcel, lying wholly without such limits and having separate and distinct boundaries, merely because the two parcels corner with each other. Tracts so situated are in fact, * * * separate and distinct parcels of ground." *Tomera Placer Claim*, 33 L. D. 560 (1905).

The fact that a placer location, if made to conform to the rectangular public land surveys, as required by Rev. St. 2331, would embrace small portions of land not valuable for mining, does not excuse failure to comply with the statute, where the land embraced in the location, if conformed to the legal subdivisions, would be as a whole more valuable for mining than for agricultural purposes. Nor is such failure excused by the fact that by conforming to the legal subdivisions the claim would be made to include lodes as well as placer ground. *Hogan & Idaho Placer Min. Claims*, 34 L. D. 42 (1905).

The fact that a placer location, if made to conform to the rectangular subdivisions of the public surveys, would embrace all or a portion of the land covered by a prior location, does not excuse a failure to so conform as required by Rev. St. 2331. Prior locations, so far as unentered, do not amount to appropriations of the lands embraced in them in such a sense as to preclude their inclusion in a subsequent location, subject to such rights as then existed and were subsequently maintained under such prior locations. If such prior locations had been entered, that fact would not make it impracticable to conform the subsequent location to the legal subdivisions, because under the settled law and practice the former would be excluded from patent proceedings involving the latter. *Rialto No. 2 Placer Min. Claim*, 34 L. D. 44 (1905).

The statute contemplates that, where the topography of the adjacent ground is not such as to make it impracticable, the location should conform to the system of public land surveys, that is, it should be "rectangular in form and of dimensions corresponding to appropriate legal subdivisions, and with east-and-west and north-and-south boundary lines." *Laughing Water Placer*, 34 L. D. 56 (1905).

"The statute does not contemplate that in the location and entry of placer mining claims rectangular tracts of five acres may be recognized and treated as legal subdivisions of the public surveys. The smallest legal subdivision provided for by the statute is a subdivision of ten acres; and that must be in square form, else it would not be a subdivision according to the system of the public land surveys." *Roman Placer Min. Claim*, 34 L. D. 260 (1905).

Land containing a deposit of marble can be located and patented only as a placer claim. "The deposits of marble in the claims in question are not vein or lode deposits within the meaning of the statute, and the lands embraced in the entry are therefore not subject to location and patent under the provisions applicable to vein or lode claims. This is not because the deposits are not 'in vein or lode' formation.' * * * but rather, or at least primarily, because the deposits are not of the kind or character, contemplated by sections 2320 and 2322. The marble involved is not mineral-bearing rock in the sense of the statute. There is no claim or contention that it contains even a trace of any of the minerals named in the statute, or of any other mineral substance, distinct from the rock itself." *Henderson v. Fulton*, 35 L. D. 652 (1907).

A placer claim was passed to patent, which was bounded by six courses, one of which ran nearly east and west, and the others at diagonals to the courses of the public survey lines; and which for the most part represented a diamond shaped figure, and was entirely surrounded by other claims. This claim was situated in Alaska, where investigation had shown that there were thousands of placer claims, practically none of which conformed to the east-and-west or north-and-south lines of the system of public surveys, that these claims were for the most part compact in form, and that to require conformity now would involve claimants in thousands of law suits. The very strict construction recently put on Rev. St. 2329-31, therefore, requires modification. "Placer claims in Alaska in reasonably compact form, containing the proper area, and located according to the rules, regulations and customs of miners, ought to be approved for patent.

"The Department would now be unwilling to approve such long and irregular shaped claims as were allowed in the case of William Rablin (2 L. D. 764) and in the case of Pearsall (6 L. D. 227), although the law in those cases is clearly and correctly stated. The Department also holds that it is unreasonable, impracticable and not in harmony with the conformity provision of the statute to require a claimant to conform to legal subdivisions of the public surveys and the rectangular subdivisions thereof when such requirement would compel a claimant to place his lines on other prior located claims or when his claim is surrounded by prior

locations, and therefore disapproves the doctrine announced in Rialto No. 2 Placer Min. Claim (34 L. D. 44) and in stating this no distinction should be made whether the claim be on surveyed or unsurveyed lands. The principle of the case of Golden Chief "A." Placer Claim (35 L. D. 557) should be modified accordingly, and also all other cases not in harmony with these views.

"Each case presented must be considered and decided on its own facts. Conformity is required if practicable. In the interest of wise administration and under the power which we think Congress has vested in this Department in the phrase 'shall conform as near as practicable' taken from section 2331, supra, and in order to keep claims in compact form and not split the public domain into narrow, long and irregular strips, and to provide for a less harsh rule than that which has been followed recently, and to cover cases where strict conformity is impracticable, it is the view of this Department that a claim hereafter located by one or two persons which can be entirely included within a square forty-acre tract, and a claim located by three or four persons which can be entirely included in two square forty-acre tracts placed end to end, and a claim located by five or six persons which can be entirely included in three square forty-acre tracts, and a claim located by seven or eight persons which can be entirely included in four square forty-acre tracts, should be approved. In stating this rule it is necessary to say that we do not intend that the forties which are made the unit of measure should necessarily have north-and-south and east-and-west boundary lines. Thus, no inordinately long and narrow claim could be patented, and no locator would be compelled to include non-placer ground unless he so desired, as was permitted in the case of Hogan and Idaho Placer Min. Claims, supra. Each claim heretofore located, as it comes up for patent, must be adjudged and decided upon its own facts." *Snow Flake Fraction Placer*, 37 L. D. 250 (1908).

III. LODS IN PLACERS.

p. 482. It is not necessary for a conflicting lode claimant to file an adverse claim to an application for a placer patent. The patent will not pass title to known lodes, and will not, therefore, affect the rights of the lode claimant. It is nevertheless advisable in such case to file an adverse claim, for if duly prosecuted it will result in the determination of the existence of the lode, the ascertainment of surface boundaries, and a specific exclusion from the placer patent. An adverse claim thus provides the most effectual means of reaching a final determination of the conflicting rights.

It is likewise unnecessary for a patentee of a placer claim to file an adverse claim against an applicant for a patent for a lode claim within his boundaries. It seems that he may do so, but in any event he is entitled to notice and a hearing on the question whether the lode was known to exist at the date of his application.

The limitation of twenty-five feet on each side of the lode by the terms of Rev. St. 2333 applies to the amount of surface which must be paid for at lode rates by a placer applicant, claiming a known vein. From this provision the land department and the courts of Colorado and Montana have drawn the inference that a known lode which is not included in the placer application, and is consequently excepted from the patent, carries with it also no more surface than twenty-five feet on each side. A subsequent locator of such a lode, therefore, is limited to that width of surface.

United States.

Migeon v. Montana Cent. R. Co., 23 C. C. A. 156, 77 Fed. 249 (1896), 9th Cir., affirming *Montana Cent. R. Co. v. Migeon*, 68 Fed. 811. The statement in the last paragraph of the latter case (see vol. 1, p. 490) is not considered. The court of appeals found that the previously located lode claim had been abandoned and the case, consequently, taken out of the ruling in *Noyes v. Mantle*, 127 U. S. 348, 32 Law. Ed. 168.

Hawley, D. J.: "There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein within the intent and meaning of different sections of the Revised Statutes: (1) Between miners who have located claims on the same lode, under the provisions of section 2320; (2) between placer and lode claimants, under the provisions of section 2333; (3) between mineral claimants and parties holding town-site patents to the same ground; (4) between mineral and agricultural claimants of the same land. The mining laws of the United States were drafted for the purpose of protecting the bona fide locators of mining ground and at the same time to make necessary provision as to the rights of agriculturists and claimants of town-site lands. The object of each section, and of the whole policy of the entire statute, should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from the difference in the facts and a difference in the character of the cases, and the advanced

knowledge which experience in the trial of the different kinds of cases brings to the court. * * * The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes has been decided by many courts. All the authorities cited by appellants are referred to in *Book v. Justice Min. Co.*, 58 Fed. 106, 121. The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: That the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode.

"But in construing the provisions of section 2333 it is evident that other questions are to be taken into consideration. This section of the statute was primarily intended for the benefit and protection of the locators of placer claims. * * * It matters not whether there is a lode or vein actually within the limits, which subsequent developments may prove. If it is not known to exist at the time of the application the patent for the placer claims will include such lode or vein. In such cases the supreme court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other precious metals to justify their designation as 'known veins or lodes'; that, in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. * * *

"The decisions of the supreme court upon controversies arising between mineral claimants on one side and parties holding town-site patents on the other are applicable to this class of cases. The doctrines therein announced are directly in line with the cases we have referred to. In such character of cases the court has repeatedly declared that, under the acts of Congress which govern such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be 'known' to contain mineral of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent."

Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S. 220, 48 Law. Ed. 944 (1904), affirming 29 Colo. 377, 68 Pac. 286, 93 Am. St. Rep. 89, 64 L. R. A. 209 (1902). See this case on page 381.

California.

Mutchmor v. McCarty, 149 Cal. 603, 87 Pac. 85 (1906). A vein known to exist within the boundaries of a placer claim at the date of the application for patent and not included in the application may be located by an adverse claimant after the issuance of the patent; and a vein is known to exist within the meaning of the statute when it is known to the placer claimant, when its existence is generally known, or when any examination of the ground sufficient to enable the placer claimant to make oath that it is subject to location as such would necessarily disclose the existence of the vein.

A quartz deposit which contains so small a percentage of gold and silver as to be of no value for mining purposes is not a known vein within the meaning of the law, and whether it is of any practical value is a question for the jury.

Colorado.

Mt. Rosa Min., Mill. & Land Co. v. Palmer, 26 Colo. 56, 56 Pac. 176. 77 Am. St. Rep. 245, 50 L. R. A. 289 (1899). Lodes or veins of mineral in place are not the subject of a placer grant; "and a placer location does not operate to confer the title or possession thereof upon the placer claimant, or withdraw them from subsequent location by others. In other words, the placer location gives a qualified possession of the ground located; that is to say, it confers upon the owner the exclusive right of possession of the surface area, for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give right of possession to known lodes or veins within its limits.

* * * A patent for a placer claim does not convey title nor right of possession to the patentee to any lodes known to exist therein at the date of application; if he desires to obtain such title and possession, he must comply with the provisions of sec. 2333, and patent them as lode claims." Where a lode claim is patented within the boundaries of a placer location, even though by a person other than the placer claimant, the claim is limited to 25 feet of the surface on either side of the middle of the vein, under Rev. St. 2333. This section in terms applies only to the case where the patentee of a placer location wishes to include in his patent known veins or lodes within the boundaries of the placer. But it is applicable not only to the placer claimant, but as well to others who locate lodes within the boundaries of his previously located placer. Rev. St. 2320, giving 300 feet on each side of the middle of the vein, does not apply, being intended to apply only to the location of lodes not conflicting with any other class of mineral locations.

McConaghy v. Doyle, 32 Colo. 92, 75 Pac. 419 (1903). As between a placer patent and conflicting lode locations, a vein within the boundaries of the placer, in order to be excepted from the conveyance to the patentee, must be known to exist at the time of application for patent for such placer.

and known to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them.

In such case the burden of proof is upon the lode claimant to establish by clear and convincing testimony that the vein or veins, which he claims are exempted from the placer application by operation of law, are of the character which will render them known veins, as thus defined. "Mere outcroppings or other indications of a vein within the limits of a placer, or evidence of the existence of a vein which might be sufficient to support a lode location as against a conflicting lode claim, or sustain a lode location as against a subsequent placer location in an adverse proceeding, are not sufficient to establish the existence of a known vein or lode within the boundaries of a placer prior in point of time, and which has been patented."

Moffat v. Blue River Gold Excavating Co., 33 Colo. 142, 80 Pac. 139 (1905). See this case on page 389.

Montana.

Butte & Boston Min. Co. v. Sloan, 16 Mont. 97, 40 Pac. 217 (1895). In an action of ejectment for a mining claim the jury found that no lode or vein was known to exist upon the patented placer ground at the time of the application for the patent therefor. It was discovered after the trial that long previous to such application a lode claim had been located upon the ground and a notice thereof recorded and on this ground a new trial was asked. The court refused a new trial, since the mere recorded evidence of a claim of discovery could not overcome the finding of the jury that no veins or lodes were known to exist.

Casey v. Thieriege, 19 Mont. 341, 48 Pac. 394, 61 Am. St. Rep. 511 (1897). To meet the designation "known" veins or lodes in Rev. St. 2333, veins or lodes within the boundaries of a placer claim must at the time of the application for patent have been clearly ascertained and must have been of such an extent, character and value as to justify their exploitation. The presumption is in favor of the placer patentee, and the exception cannot be established by evidence that in working the ground as placer previous to the application indications of veins were encountered, quartz filled crevices bearing silver exposed between walls in the country rock, but that these had not been explored or examined with a view to prospecting or working them.

Noyes v. Clifford, 37 Mont. 138, 94 Pac. 842 (1908). Plaintiffs applied for patent for certain premises as a placer claim on July 18, 1879, and a patent was issued to them on April 15, 1881. Defendants located a lode claim upon a vein within these premises on May 20, 1890, claiming that the vein was known to exist at the date of application for the placer patent, and that they were consequently entitled to the same, together with twenty-five feet of surface on each side thereof. In an action of ejectment for this ground it was not error to instruct the jury as follows: "A known vein, within the meaning of the term as used in these instructions, is a vein known to exist at the time of the application, which has been clearly

ascertained, and is of such an extent and value as to render the land more valuable on that account and to justify its exploitation and extraction of the mineral therefrom. This does not necessarily mean that the vein must show mineral values to such extent as would make the working of the same a profitable pursuit at the place where it is exposed; nor is it necessary that the values contained shall be such as to demonstrate or prove that there exists a shoot or body of ore within the vein which it will pay to develop and extract. The phrase, 'of such value as to justify the exploitation of the vein and extraction of the mineral therefrom,' is intended to mean, and does mean, that the vein is of such a character as would justify an ordinary person who was seeking in good faith to develop a mine in developing and working upon the said vein. In considering, however, the question as to whether or not any vein is a known vein, within the meaning of the term, it is proper, and you should take into consideration the amount of ore, the facility of working and reaching it, as well as the product per ton which might or could be obtained therefrom, at the time of the application for patent."

In determining what is a vein or lode within the meaning of Rev. St. 2333, the same tests and definitions are to be applied as in determining what is a vein or lode under Rev. St. 2320. It is necessary to show that the vein was known to exist at the date of application for placer patent, but not that it was known at that time to contain ore of such extent and value as to justify the expenditure of labor and money for the purpose of developing and utilizing its contents. Evidence is admissible of the character, extent and value of the contents of the vein at any time, either before or after the beginning of patent proceedings. Evidence of what the vein contained at the date of the lode location was evidence of what it contained at the time of the application for placer patent. The opinion of practical miners, acquainted with the ground in controversy, as to whether the vein would have justified a prospector in good faith seeking to develop the same, to expend time and money for that purpose, is admissible.

Whether the vein was known to exist at the date of application for patent, and whether it contained such values as made it more valuable on that account, and justified exploitation for the purpose of extracting and utilizing these values, are questions for the jury.

South Dakota.

McCarthy v. Speed, 11 S. D. 362, 77 N. W. 590, 50 L. R. A. 184 (1903).
See this case on page 376.

LAND OFFICE DECISIONS.

The patentee of a placer mining claim is under no legal obligation to institute adverse proceedings against a subsequent conflicting lode claim. The lode claimant in such a case has the burden of proof upon him to show

that there was a vein within the placer, known to exist, at the time of the placer application, and actual knowledge thereof must be brought home to the placer applicant. *Discovery Placer Claim v. Murry*, 25 L. D. 460 (1897).

"Lodes or veins known to exist within a placer claim at the date of the application for the placer patent, and which are not applied for at that time by the placer applicant, are by operation of law excepted from the placer patent, and a clause fully recognizing this exception is inserted in all placer patents without previous inquiry by the land department into the existence of any such lode or vein."

The protest of a conflicting lode claimant, who did not file an adverse claim, and whose lode is not mentioned or claimed in the application, will be dismissed.

"The rights of the protestant as a lode claimant, whatever they may be, will not be affected by the issuance of a patent upon the placer entry as allowed, but will be preserved and protected as fully as if now determined and specifically excepted from the operation of that patent, and the subsequent issuance of lode patents to the protestant covering its rights to the known lodes or veins, if there were such at the date of the placer application, will not be prevented or hindered by the placer patent." *Elda Min. & Mill. Co. v. Mayflower Gold Min. Co.*, 26 L. D. 573 (1898).

Patent for a placer was issued in 1893. Prior thereto in 1891 a lode claim had been located which in part conflicted therewith. This was based on a discovery outside of the placer, but the vein was not uncovered within the placer boundaries prior to the date of placer application. No adverse was filed.

Held, first, that these facts did not establish the existence of a known vein in the placer. "Where the existence of a vein or lode within a placer claim is otherwise unknown its existence is not made known by the mere inclusion of that ground within a lode location. The marking of a lode claim upon the ground and the recording of the location notice may actually or constructively extend to others the knowledge upon which the lode claimants based their location, but it cannot make known a vein or lode the existence of which is otherwise altogether unknown." "This conclusion receives some support in the conduct of the lode claimant. If the lode location embraced a vein or lode the existence of which within the placer boundaries was then ascertained and known, an adverse claim duly filed and prosecuted would have resulted in the direct and special exclusion from the placer patent of such known vein or lode and the adjoining surface area rightfully incident thereto. While the exception of a known vein or lode not applied for by the placer claimant does not depend upon the filing and prosecution of an adverse claim, the fact remains that this course presents the most effectual means of obtaining a final and satisfactory determination and adjustment of the rights of the conflicting claimants."

Second. That discovery and development subsequent to the application for placer patent will not be considered. The question must be determined by what was known to exist at that time.

Third. Upon the subsequent application for a lode patent the burden of proof is on the lode claimant. *Cripple Creek Gold Min. Co. v. Rosa Min., Mill & Land Co.*, 26 L. D. 622 (1898). See, also, *Kohnyo & Fortuna Lodes*, 28 L. D. 451 (1899).

"When it is duly ascertained that a lode alleged to have been known to exist within the placer boundaries at the date of the application for patent to the placer claim was not known so to exist, it must be held that the title of the United States to such lode passed under the patent and the jurisdiction of the land department was thereby terminated."

Application for placer patent was made containing no statement as to any vein or lode within its boundaries, and patent issued thereon. Subsequently applications were made for lode patents, to which the placer patentee filed adverse claims. Suit on these was decided in his favor. This was a determination that no vein was known to exist at the date of placer application and a subsequent lode application by the placer patentee will not be allowed. *Alice Min. Co.*, 27 L. D. 661 (1898).

An application for a placer patent did not disclose the existence of any known lode within the boundaries of the claim or assert any right to any such lode. No adverse claims were filed, but subsequent applications were made for conflicting lode claims, based on prior locations. Held, if there be a lode within the placer boundaries whose existence was known at the time of the placer application, the applicant has conclusively declared that he has no right of possession to it. The placer entry was passed to patent. "If the lode claimants desired to further prosecute their applications for patent to the areas in conflict, it will be necessary for them to establish at a hearing, of which the placer claim must have due notice, that such areas contain veins or lodes whose existence was known at the date of the application for the placer patent." *Cape May Min. & Leasing Co. v. Wallace*, 27 L. D. 676 (1898).

A protest on behalf of a lode claimant, against the issue of a patent on a placer entry, will not be entertained on questions involving the placer character of the land and compliance with the law, where the entry was regularly allowed on satisfactory proof, sustained in the courts, and it is not asserted that the existence of any of the lodes claimed by protestants was known at the time of the placer application and the lode location was not made until many years after the placer entry. *Meaderville Min. & Mill. Co. v. Raunheim*, 29 L. D. 465 (1900).

See the following cases on pp. 461, 462, 466. *North Star Lode*, 28 L. D. 41 (1899); *Clipper Min. Co. v. Scarl*, 29 L. D. 137 (1899); *Clipper Min. Co. v. Eli Min. & Land Co.*, 33 L. D. 600 (1905).

Where an application for placer patent does not include a vein or lode then known to exist, the lateral surface which is reserved and does not pass by the placer patent is limited to twenty-five feet on each side of the vein or lode. This limitation applies to one who subsequently locates a claim upon this lode and applies for patent thereto. Follows and quotes *Mt. Rosa Min. & Mill. & Land Co. v. Palmer*, 26 Colo. 56, 56 Pac. 176, 77 Am. St. Rep. 245, 50 L. R. A. 289. *Daphne Lode Claim*, 32 L. D. 513 (1904).

An application for a patent to a lode within the limits of a placer claim for which an application is pending will not be permitted to proceed beyond the point of filing, in the absence of a determination by the department that the lode was known to exist at the date of the filing of the placer application. Proceedings to determine that question cannot be taken, when the lode claimant has filed an adverse claim and begun suit, during the pendency of which all proceedings in the department are stayed. *Jaw Bone Lode v. Damon Placer*, 34 L. D. 72 (1905).

IV. TUNNEL CLAIMS.

p. 494. Much of the uncertainty as to the construction of Rev. St. 2323 which was expressed in volume one of this work has been removed by recent decisions. The views held by some courts as set out in (b) (see vol. 1, p. 495) have been finally overruled. The following propositions have been settled by the supreme court of the United States. The tunnel owner who discovers a blind lode in his tunnel is entitled to that lode and to the ore contained in it for the distance of 1,500 feet along its length. This length he may lay out on either side of the tunnel, or partly on one side and partly on the other. He may or may not, as he chooses, locate upon the surface a lode claim based upon such a lode discovery in the tunnel. Lode claims located upon the surface by others after the location of the tunnel claim must, if they conflict with a lode discovered in the tunnel, give way to the right of the tunnel owner. This is the case, even though such lode claims have been patented, there being no obligation on the tunnel owner to have filed adverse claims to the applications for patent before discovery of his lode. Whether he is obliged to do so after the discovery of a lode in the tunnel is now doubtful, notwithstanding the decision of the department in 1 L. D. 584. (See vol. 1, p. 503.)

On the other hand, the tunnel owner's rights are subordinate to lode claims located prior to his location. He may not follow the lodes or veins which he discovers in his tunnel into the lines of such prior claims. And if such claims lie across the line of his tunnel, it may not be driven through their territory. As to the right to run tunnels under the provisions of state statutes, see chap. XIX, div. II, B, below.

For the present regulations as to the method of locating tunnel sites, see Land Office Regulations of March 29, 1909, pars. 16 to 18. See, also, Nevada Comp. Laws, §§ 226 to 229.

United States.

Enterprise Min. Co. v. Rico-Aspen Con. Min. Co., 167 U. S. 108, 42 Law. Ed. 96. (1897), affirming 66 Fed. 200 (see vol. 1, p. 497). The plaintiff located its tunnel site July 25, 1887. On June 5, 1892, a vein was discovered therein and a claim located on this vein of which 54 feet was on the north-east of the tunnel and 1,446 on the southwest. This claim conflicted with the claim of defendant which had been located in 1888 on a discovery made in the same year and for which a patent had issued February 6, 1892. Held, the plaintiff was entitled to that part of the vein which was contained in the area in conflict.

Brewer, J.: "The clear import of the language then is to give to the tunnel owner, discovering a vein in the tunnel, a right to appropriate fifteen hundred feet in length of that vein. When must he indicate the particular fifteen hundred feet which he desires to claim? Counsel for plaintiffs contend that it should be done when in the first instance the tunnel is located, and that if no specification is then made the line of the tunnel is to be taken as dividing the extent of the claim to the vein, so that the tunnel owner would be entitled to only 750 feet on either side of the tunnel; while counsel for defendant insist that he need not do so until the actual discovery of the vein in the tunnel. We think the defendant's counsel are right. * * It may be true, as counsel claim, that this construction of the statute gives the tunnel excavator some advantages. Surely it is not strange that Congress deemed it wise to offer some inducements for running a tunnel into the side of a mountain. At the same time it placed specific limitations on the rights which the tunnel owner could acquire. He could acquire no veins which had theretofore been discovered from the surface. His right reached only to blind veins, as they may be called, veins not known to exist, and not discovered from the surface before he commenced his tunnel. It required reasonable diligence in the prosecution of his work. It placed a limit in length, 3,000 feet, beyond which he might not go in his search for veins and acquire any rights under his tunnel location, and the veins to which he might acquire any rights were those which the tunnel itself crossed. Such is the import of the letter, to which counsel refer, from Commissioner Drummond, of date September 20, 1872. Land Office Report, 1872, p. 60; 3 Copp's Land Owner, 130. It may be also noticed that in this letter the commissioner affirmed the right of location on either side of the tunnel, in these words: 'When a lode is struck or discovered for the first time by running a tunnel, the tunnel owners have the option of recording their claim of fifteen hundred feet all on one side of the point of discovery or intersection, or partly on one and partly upon the other side thereof.'

"We hold, therefore, that the right to a vein discovered in the tunnel dates by relation back to the time of the location of the tunnel site and also that the right of locating the claim to the vein arises upon its discovery in the tunnel and may be exercised by locating that claim the full length of 1,500 feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire."

The law of 1861 (M. A. S., § 3141), if not repealed by the legislation of Colorado, was superceded by the legislation of congress. See this case also on page 442.

Campbell v. Ellet, 167 U. S. 116, 42 Law. Ed. 101 (1897), affirming *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521 (see vol. 1, p. 500). It is not necessary to the validity of a claim based on a discovery in a tunnel that it should be marked on the surface. Brewer, J.: "But without determining what would be the rights acquired under a surface location based upon a discovery in a tunnel, it is enough to hold, following the plain language of the statute, that the discovery of the vein in the tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and that a location on the surface is not essential to a continuance of that right. We do not mean to hold that such right of possession can be maintained without compliance with the provisions of the local statutes in reference to the record of the claim or without posting in some suitable place, conveniently near to the place of discovery, a proper notice of the extent of the claim—in other words, without any practical location. For in this case notice was posted at the mouth of the tunnel and no more suitable place can be suggested, and a proper notice was put on record in the office named in the statute."

Stratton v. Gold Sovereign Min. & Tunnel Co., 1 Leg. Adv. 350 (1897). C. C. D. Colo. There are three kinds of locations on the public mineral lands; lode locations, tunnel locations, and placer locations. When a location has been properly made in either class, and so long as it shall be fully maintained by use and enjoyment or by patent, the territory embraced in such location is not subject to adverse location by a claimant of the same class or any other class. Therefore, a tunnel locator has no right to run his tunnel through a lode claim located before the location of his tunnel.

Portland G. M. Co. v. Uinta Tunnel M. & T. Co., 1 Leg. Adv. 494 (1898). C. C. D. Colo. To same effect as last case.

Cone v. Roxanna Gold Min. & Tunneling Co., 2 Leg. Adv. 350 (1899). C. C. D. Colo. The statutes of Colorado of 1861 (M. A. S., § 3141) and of 1897 (11th Sess. Laws '97, p. 181, § 1), providing that a tunnel owner should have the right to drive and continue the same through and across any located or patented claim in front of the mouth of such tunnel, are unconstitutional under §§ 14 and 15, art. 2, of the state constitution, since they make no provision for ascertaining the need of the tunnel owner for right of way through the servient estate in order to work his own claim beneficially, or for compensating the damage done to the estate appropriated

to the use of the tunnel. The supreme court of the state held that these statutes referred only to tunnels for discovery and not to tunnels for development in *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*

Calhoun Gold Min. Co. v. Ajax Gold Min. Co., 182 U. S. 499, 45 Law. Ed. 1200 (1901), affirming 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 (1899). One who locates a tunnel claim and runs a tunnel in which he discovers blind lodes which do not appear on the surface is not entitled to them if they appear within the lines of a previously located and patented lode claim. The tunnel is run in subordination to the rights given to the lode claimant by Rev. St. 2322. Nor has the tunnel claimant a right of way through such claim. Section 2323 "contemplates that tunnels may be run for the development of veins or lodes, for the discovery of mines, gives a right of possession of such veins or lodes, if not previously known to exist, and makes locations on the surface after the commencement of the tunnel invalid. There is no implication of a displacement of surface locations made before the commencement of the tunnel. Indeed, there is a necessary implication of their preservation. And there can be no implication of a conflict with the rights given by section 2322. The exclusiveness of those rights we have declared. The tunnel can only be run in subordination to them."

Creede & Cripple Creek Min. & M. Co. v. Uinta Tunnel Min. & Transp. Co., 196 U. S. 337, 49 Law. Ed. 501 (1905), affirming *Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co.*, 119 Fed. 164 (1902). "The owner of a tunnel never receives a patent for it. There is no provision in the statute for one, and none is in fact ever issued. No discovery of mineral is essential to create a tunnel right or to maintain possession of it. A tunnel is only a means of exploration. As the surface is free and open to exploration, so is the subsurface. The citizen needs no permit to explore on the surface of government land for mineral. Neither does he have to get one for exploration beneath the surface for like purpose. Nothing is said in section 2323 as to what must be done to secure a tunnel right. That is left to the miners' customs or the state statutes, and the statutes of Colorado provide for a location and the filing of a certificate of location. When the tunnel right is secured the Federal statute prescribes its extent—a tunnel 3,000 feet in length and a right to appropriate the veins discovered in such tunnel to the same extent as if discovered from the surface."

Utah.

Fissure Min. Co. v. Old Susan Min. Co., 22 Utah, 438, 63 Pac. 587 (1900). The provisions of Rev. St. 2323, and the privileges granted thereby, apply to one who locates a tunnel for discovery purposes as well as for development purposes; but failure to prosecute work on such a tunnel for six months works an abandonment of the right to all undiscovered veins on the line of such tunnel, and the owner of such tunnel is not entitled to a blind vein subsequently discovered, but he is probably entitled to the bore

of the tunnel to the extent that it has been excavated, and a space of surface ground 50 feet on each side of the mouth of the tunnel, and 100 feet extending in front thereof for dumping purposes.

V. MILL SITES.

p. 503. Ordinarily but one mill site may be entered in connection with a group of lode claims owned and operated in common as a single mine, unless the special circumstances are such that more than one mill site is necessary for the proper promotion of mining operations upon the group of claims.

The language of Rev. St. 2337, by which land which may be patented as a mill site is defined to be "non-mineral land contiguous to the vein or lode," has finally been given a literal construction by the land department which thus conforms to the popular interpretation of the statute. A mill site, therefore, if not contiguous to the vein, is not objectionable because it is contiguous to a lode claim.

For regulations as to proceedings to patent mill sites, see Land Office Regulations of March 29, 1909, pars. 61 to 65. The method of locating mill sites is prescribed in Montana by Laws of 1907, page 21, and in Nevada by Comp. Laws, §§ 222 to 225.

United States.

Valcalda v. Silver Peak Mines, 29 C. C. A. 591, 86 Fed. 90 (1898). 9th Circ. In an ejectment to recover a mill site, where the complainant relies on his own prior possession and an ouster by the defendant, it is sufficient to show possession that the corners of the claim are marked with painted posts, as is the custom and rule in marking such sites, and the claimant had a house and a stable thereon, and had constructed tunnels to increase the flow of springs, and built a wagon road to his mines, thus indicating a present and continuous use. He did not have to show the use of the land for the purpose for which it was located. Failure to so use the land might be evidence of abandonment, but the complainant was not required to negative abandonment.

California.

Burns v. Clark, 133 Cal. 634, 66 Pac. 12, 85 Am. St. Rep. 233 (1901), followed in *Burns v. Schoenfeld*, 1 Cal. App. 121, 81 Pac. 713 (1905). Defendants went upon unoccupied and unlocated government ground, to which they expected ultimately to acquire title as a mill site, and engaged

laborers to grade the land. One of these discovered gold outside the limits of the graded space, which he excavated and took possession of. As against the defendants, it belonged to him, and the defendants having deprived him of it are liable to him for its conversion. Their occupation of the land is not such as to give basis of title, and in any event they could not acquire title to mineral land by occupancy, except for the purpose of mining or extracting minerals.

Colorado.

Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207 (1901). Where a lode claim is located on ground already taken as a mill site, the locator of the lode claim must show that the land is mineral, i. e., he must show to the satisfaction of the jury that the land contained minerals of such quantity and quality that they could have been extracted at a profit at the time when the rights of the owner of the mill site attached. Where the location is for a mill site only, the rights of the locator attach from the time of his location of the site, if he commence the construction of reduction works within a reasonable time thereafter, or, if he do not, from the time when in good faith he does commence such construction. Neither class of mill site can be lawfully located on mineral land.

LAND OFFICE DECISIONS.

Plat and notice of location must be posted on the mill site during the period of publication. Reference will not be made to the board of equitable adjudication under New York Lode & Mill. Site, 5 L. D. 513 (see vol. 1, p. 507), where the mill site is 13,000 feet from the lode claim. *Silver Star Mill Site*, 25 L. D. 165 (1897).

In an entry for a mining claim and mill site, the mill site was omitted from the publication. The department ordered publication. The effect was held to be the same as if there had been no entry, and application was being made for the first time. A protest alleging that the land was mineral having been filed, a hearing will therefore be ordered. *Reed v. Bouron*, 26 L. D. 66 (1898).

Plat and notice must be posted on the mill site as well as on the lode and entry will not be allowed where this is not done. (New York Lode & Mill. Site, 5 L. D. 513, overruled.) *Peacock Mill Site*, 27 L. D. 373 (1898).

The right to a patent for a mill site, under the second clause of Rev. St. 2337, depends upon the presence on the land applied for of a quartz mill or reduction works. The fact that the applicant has a mill and reduction works upon other land adjoining does not help the matter. *Brodie Gold Reduction Co.*, 29 L. D. 143 (1899).

"The logical inference is that the mill site provision is intended solely to subserve a recognized practical necessity, contemplating an accession for specified purposes to acquired mining rights and is not a provision

for the acquisition of merely additional superficies in connection with each lode location under section 2320. Whilst no fixed rule can well be established, it seems plain that ordinarily one mill site affords abundant facility for the promotion of mining operations upon a single body of lode claims. It is not to be supposed that Congress intended a grant of an equal number of such tracts as rightfully incident to all the lode claims of a compact group held and worked under a common ownership. Every provision for the disposal of the public domain is intended to subserve some substantial, useful purpose. There is nothing in the language or reason of the statute to permit a mill site to be taken and acquired in connection with each mining claim of such a group as that in question here. A separate mill site cannot, therefore, be regarded or allowed as complementary to each of these lode locations."

A boarding house, store, saw mill and wharf do not show use and occupation for mining or milling purposes within the meaning of the statute. "This express requirement plainly contemplates a function or utility intimately associated with the removal, handling or treatment of the ore from the vein or lode. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy the mill site at the time patent thereto is applied for to come within the purview of the statute." *Alaska Copper Co.*, 32 L. D. 128 (1903).

"The statute clearly contemplates that at the time the application for patent is made the land included in the mill-site claim is used or occupied for mining or milling purposes. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the mill-site at the time application for patent is filed. So far as the record in this case shows, aside from the digging of three wells, nothing has been done on the mill-sites. The design to use all of them for the purpose of a reservoir for water, and the building of a reduction works, is not the present active employment of any mining agency upon the land or the direct use of it for milling purposes. Neither is the storing of ore upon each mill-site, under the circumstances of this case, such a use of the land as to warrant the entry and patent of the four mill-sites."

It follows from *Alaska Copper Co.*, 32 L. D. 128, "that if more than one mill-site is applied for in connection with a group of lode claims, a sufficient and satisfactory reason therefor must be shown. The storage of a quantity of ore upon each of the four mill-sites in this case, where there is nothing to show but that the area embraced in one of them would be ample for such storage, is but a mere colorable use of the mill-sites, which does not satisfy the requirements of the statute." *Hard Cash & Other Mill Site Claims*, 34 L. D. 325 (1905).

The provision of Rev. St. 2337, confining mill sites to "non-mineral land not contiguous to the vein or lode," is intended to prevent the appropriation within the area of the mill site of a further segment of the actual vein or lode upon which the mining claim itself is predicated. A mill site,

if not contiguous to the vein, and embracing only nonmineral land, is not objectional because it is in contact with a side line of the lode claim. *Brick Pomeroy Mill Site*, 34 L. D. 320, is overruled, as is also *Alaska Copper Co.*, 32 L. D. 128, to the extent to which it conflicts with this decision. *Yankée Mill Site*, 37 L. D. 674 (1909).

CHAPTER XVI.

CONFLICTING GOVERNMENT GRANTS.

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| I. Town Site Grants. | IV. Homestead and Preemption Grants. |
| II. School Land Grants. | V. Indian Reservations. |
| III. Land Grants to Railroads. | VI. Forest Reservations. |

I. TOWN SITE GRANTS.

p. 511. Section 16 of the act of March 31, 1891, applies by its terms only to incorporated towns. The rights of those claiming minerals within the limits of unincorporated towns are, therefore, not assisted by that statute, but are controlled by the general town site laws and are defined by Rev. St. 2386, 2392. Under the present practice of the land department, and its interpretation of the statutes, the position of the mineral claimant who conflicts with an unincorporated town site differs little, if any, from that of the claimant who conflicts with the site of an incorporated town. (The act of 1891 adds lead to the list of enumerated minerals.) In *Lalande v. Townsite of Saltese*, 32 L. D. 211, it is said that while the provisions of Rev. St. 2386 and 2392 are substantially the same as the excepting provisions of § 16 of the act of 1891, with respect to patents issued under the section, it is to be observed that in the former it is not provided in terms, as it is in the latter, that patent may be obtained by the claimant of the excepted mineral veins, mining claims or possessions, after the town site patent shall have issued. In that case protests by mineral claimants against the issue of a patent to an unincorporated town were dismissed, for the reasons that the patent would not operate to convey title to lands known to be mineral at the date of entry and would not affect the rights of the protestants and that they might subsequently apply for and obtain patents under proper proceedings to any lands claimed by them within the town site which were valuable for minerals

at the date of the entry, the same as though the town site patent had not been issued. This result is substantially the same as that reached in *Hulings v. Ward Townsite*, 29 L. D. 21, in the case of an incorporated town.

The former practice of the department, therefore, by which it required proceedings for the vacation pro tanto of the town site patent before it would issue a mineral patent for land within the limits of the town site (see vol. 1, pp. 513, 525), has been abandoned. Since the town site patent does not pass the minerals, mining claims and possessions mentioned in the statutes, the issuance of such patent does not divest the jurisdiction of the department over the minerals and land so reserved.

The proviso of § 16 of the act of March 31, 1891, "creates one distinction between unincorporated and incorporated towns as regards the relative rights of townsite occupants and mineral claimants, which is, that whereas the townsite patent will, in either case, carry absolute title to any mineral not known to exist at the date of townsite entry, the adverse rights of mineral and town-lot claimants within incorporated towns are hinged upon priority of initiation. That is to say, that after entry is made for such town, no entry, by a mineral-vein applicant, will be allowed for any land owned and occupied under the townsite law by a party whose possession antedated the inception of the mineral applicant's claim, even though such land was known, at date of the townsite entry, to contain valuable minerals." (Townsite Regulations of August 7, 1909, 38 L. D. 115.)

United States.

Migcon v. Montana Cent. R. Co., 23 C. C. A. 156, 77 Fed. 249 (1896). 9th Circ. See this case on page 536.

Bonner v. Meikle, 82 Fed. 697 (1897). C. C. D. Nev. Land occupied by lot holders of a town site, for which patent has not yet been applied for, is not open to location by mineral claimants.

Hawley, D. J.: "The citizens of a town have as much right to build houses upon the public domain in which to live as others have to locate mining claims upon which to work. One purpose is as necessary as the other. Both are entitled to the equal protection of the law. Although complainants have not connected themselves with any government title, nor sought in any manner to secure such title, yet they have such a possessory right to the land upon which their buildings have been erected as will prevent others not having any title from the government from entering thereon,

and taking their property from them without first establishing a superior right thereto." "It is true that no steps have been taken by the town-site claimants of DeLamar to obtain a town-site patent in order to procure a title from the government. They might have done so; and if they had, then the mineral claimants to the Naid Queen Mining location could have protested, and the identical question here raised would then have been presented. The fact as to which party first applies for a patent certainly cannot make any difference in the principle which is involved."

This was an action on an adverse claim in which the lot holders were protestants and it was not satisfactorily shown that any of the ground located by the mineral claimants contained minerals, certainly not that part covered by the town lots. See this case also on page 265.

Young v. Goldsteen, 97 Fed. 303 (1899). D. C. D. Alaska. See this case on page 443.

Larned v. Jenkins, 51 C. C. A. 344, 113 Fed. 634 (1902). 8th Circ. It is mines known to exist at the time a town site patent is issued, and those only, that are excepted from its grant by Rev. St. 2392.

Goldstein v. Behrends, 59 C. C. A. 203, 123 Fed. 399 (1903). 9th Circ. See this case on page 445.

California.

Callahan v. James, 141 Cal. 291, 74 Pac. 853 (1903), reversing 71 Pac. 104 (1902). Rev. St. 2392 provides that no town lot title shall be acquired "to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws." Under this section it is not sufficient that there be in fact a mine of gold, silver, cinnabar or copper, unless at the time of the town site entry it is known to be such; but in the case of a "valid mining claim or possession held under existing laws," it is immaterial whether or not at the time of the entry of the town site, or at any time thereafter, the land embraced in the mining claim was known to contain minerals of such extent and value as to justify expenditure for the purpose of extracting them.

Colorado.

Moyle v. Bullene, 7 Colo. App. 308, 44 Pac. 69 (1896). The fact that the discovery was within the patented limits of a town site is irrelevant, where all the evidence shows that the existence of a mineral bearing vein at the place where the discovery was made was known long previous to the application for or receipt of the title by the town.

Montana.

Silver Bow Min. & Mill. Co. v. Clark, 5 Mont. 378, 5 Pac. 570 (1885). A mining claim was regularly located on November 16, 1875, and a patent was issued therefor on January 15, 1880. In this was a clause "excepting and excluding from said patent all town-site property rights upon the

surface; and all houses, buildings, lots, blocks, streets, alleys or other municipal improvements on the surface of said P. Mining Claim." On September 26, 1877, a patent for Butte town site issued, covering the surface of the claim. This patent provided that "no title shall be hereby acquired to any mine of gold, silver, cinnabar or copper, or to any valid mining claim and possession held under existing laws of Congress."

The claimant under the mineral patent had a good title. The location of the mining claim was a grant upon which the land ceased to be public and was no longer open to entry under the town site laws. The land department had no authority to make the exception contained in the mineral patent and that exception was void. The mineral claimant was under no obligation to file an adverse claim to the town site entry.

Horsky v. Moran, 21 Mont. 345, 53 Pac. 1064 (1898). Where a United States patent is granted for a town site, and such site covers land of which one is in possession under a validly located placer claim at the time of the application for such patent, it is voidable, but not wholly void. The government can, on its own account, authorize proceedings to vacate the patent or to limit its operation; or a person whose rights are injuriously affected by the existence of the patent, and who can connect himself with the original source of title, can obtain equitable relief so as to control the legal title in the patentee's hands. But where such person or locator has not been in possession of the land in controversy for some twenty years, and has allowed one claiming under the town site patent to be in possession of the land during that time, he is guilty of such laches as will place him beyond the pale of any equitable relief, either directly, or indirectly through the intervention of the government.

City of Butte v. Mikosowicz, 39 Mont. 350, 102 Pac. 593 (1909). Where one in good faith locates a mining claim under the mineral land law, he is presumed to have done so for the value of the minerals contained therein beneath the surface, and there is no reason why he may not prosecute mining operations without interfering with the right of the city to use the streets upon the surface of the claim. In this case the city showed such a use of the streets as amounted to a grant of a right of way under U. S. Rev. St. 2477, and consequently was entitled to recover the bed of the street in an action of ejectment against the owner of the mining claim.

Nevada.

Golden v. Murphy, 103 Pac. 394 (1909). A mining claim on land covered by a town site patent, which was valid and subsisting at the time the patent was issued, does not pass thereunder, nor is the right of possession affected thereby. "In the case at bar, while it appears that the ground embraced within the Canyon claim was sold as town lots under the town site patent. It does not appear that the lot purchasers ever acquired or attempted to acquire possession from the claimants to the ground under prior existing mining locations. The evidence is conclusive, we think, that the ground covered by the Canyon claim has been held as a valid and subsisting mining

claim from a time long prior to the date of the town site patent down to the present."

LAND OFFICE DECISIONS.

A town site patent that in terms provides that "no title shall be hereby acquired to any mine * * * or to any valid mining claim or possession held under existing laws of Congress" does not divest the department of jurisdiction to subsequently issue a patent for a lode claim within the limits covered by said town site patent, if at the date of the town site entry such lode claim was known to exist. The cases of the Pacific Slope Lode, 12 L. D. 686, and the Cameron Lode, 13 L. D. 369 (see vol. 1, p. 525), overruled. *Pacific Slope Lode v. Butte Townsite*, 25 L. D. 518 (1897). Followed in *Gregory Lode Claim*, 26 L. D. 144 (1898).

Patented mining claims within a town site entry will be excluded therefrom; but all other mining claims existing at the date of the entry are protected by § 16 of act March 3, 1891, and there is no necessity for their segregation and exclusion in terms from the town site entry and patent. Such patent when issued will not affect any rights within the patented area which existed at the date of town site entry under any valid mining claim. *Hulings v. Ward Townsite*, 29 L. D. 21 (1899); *Nome & Sinook Co. v. Townsite of Nome*, 34 L. D. 102 (1905); *Id.*, 276 (1905).

"The mining laws do not authorize or provide for adverse proceedings against an applicant for patent to mineral land by one claiming the same, or any part thereof, under laws providing for the disposal of non-mineral lands. The provisions of sections 2325 and 2326 relative to adverse claims contemplate proceedings to determine only the right of possession as between claimants of the same unpatented mineral lands; and not to decide controversies respecting the character of public lands, that is, whether they are mineral or non-mineral lands." One claiming under a town site patent has, therefore, no standing as an adverse claimant against an applicant for a mineral patent. The question between these parties must be decided by the department. *Ryan v. Granite Hill Min. & Development Co.*, 29 L. D. 522 (1900).

Land known to be valuable for minerals at the date of a town site patent does not pass thereby, and a mineral patent subsequently granted therefor is valid. *Brady's Mortgage v. Harris*, 29 L. D. 89 (1899); *Id.*, 29 L. D. 426 (1900).

When a protest against a town site application by one claiming under a prior mineral location is filed after the town site entry has been made, the burden of proof is on the protestant to establish the mineral character of the land.

"It is well settled that the conditions with respect to the character of land, as they exist at the date of entry * * * must determine whether the land is subject to sale or other disposal under the law upon which the application for patent is based; that no change in such conditions.

subsequently occurring, can impair or in any manner affect the applicant's right to a patent, if in other respects established." In order to except mineral land from the operation of a town site entry, it must be known at the time of the entry to contain minerals of such character and value as to justify expenditure for the purpose of extracting them. This requirement is not met by indications of the existence of minerals, which are not sufficient in quantity to justify any systematic or continuous prospecting or working upon a claim which had been located over seven years. *Harkrader v. Goldstein*, 31 L. D. 87 (1901).

A patent for an unincorporated town site will not operate to convey title to any lands known to be valuable for minerals at the date of the town site entry, nor will it affect any rights, present or prospective, possessory or otherwise, which may have been acquired under the provisions of the mining laws.

Owners of mining claims cannot have their rights determined in the land office by protests filed against the allowance of the town site patent. "They may subsequently apply for and obtain patent upon proper proceedings under the mining laws, to any or all lands claimed by them within the town site which they may be able to show were known to be valuable for minerals at the date of the entry, the same as though town site patent had not been issued. The law will preserve to them all rights acquired under the mining laws prior to the town site entry." *Lalande v. Townsite of Saltese*, 32 L. D. 211 (1903).

A town site patent issued under the general town site laws, or under § 16 of the act of March 16, 1891, is inoperative to convey title to any valid mining claim or possession held under the mining laws at the date of the town site entry. "In determining whether the claim here involved is a valid mining claim or possession, the question of the character of the land raised by the proceedings [protest by town lot owners against application for patent for mining claim] is a primary one. If the applicant has had ample time and opportunity to show by exploration and development whether valuable mineral deposits exist on the land, and has not done so, and has not in any manner established that the location embraces mineral land under the well settled rules of determination in cases where the character of the land is directly in issue, his location cannot be held to be a valid mining claim or possession within the meaning of the law." *Brophy v. O'Hare*, 34 L. D. 596 (1906).

II. SCHOOL LAND GRANTS.

p. 525. The rules and regulations of the department in the adjustment of grants to the several states and territories for school purposes, where the mineral or nonmineral character of the land is involved, are contained in Circular of March 6, 1903, 32 L. D. 39. (See State of Oregon, 32 L. D. 105, 412.)

United States.

Garrard v. Silver Peak Mincs, 82 Fed. 578 (1897), C. C. D. Nev., affirmed 36 C. C. A. 603, 94 Fed. 983 (1899). 9th Circ. The 2,000,000 acre grant to Nevada by act of Congress June 16, 1880, was not intended to include mineral lands. "It has been the universal policy of the general government to exclude such lands from its grants. Saline lands are mineral, and were therefore reserved from the grant to the state."

The state of Nevada having selected a certain tract inter alia, under the grant made by the act of Congress, it was included in a list certified by the secretary of the interior on Aug. 7, 1890, and subsequently patented by the state under its act of March 12, 1885, to the plaintiff. The land in question being mineral and known to be such at and before the time of the selection, no title passed to the plaintiff.

(It was held by the land department in *Manser Lode*, 27 L. D. 326 [1898], that this decision "while not conclusive upon the United States, is evidence of a high order both as to the character and condition of the land involved and the validity of the applicant's claim thereto. It will be assumed for purposes of present consideration that the said judgment is a final judgment between the parties thereto." The successful party having applied for patent and no adverse claim being made thereto, he was entitled thereto.)

Nevada.

Stanley v. Mineral Union, 26 Nev. 55, 63 Pac. 59 (1900). While ordinarily the selection for sale by the proper state authorities under the federal grant to the state of Nevada (Act of June 16, 1880; 21 Stat. 287), of non-mineral land, determines conclusively that the land is agricultural and nonmineral so as to preclude the location of a mining claim thereon, this is not true where the state legislation (Act of March 5, 1887, § 3) provides that such act of selection shall not be construed to prevent the prospecting for and working of mines on such land, and that every contract made for the sale of such land shall except all mines of valuable mineral. The discoverer of a valuable vein of gold who has located his claim properly, therefore, is entitled to the land claimed as against one to whom the state had contracted to sell the land, but had not issued a patent therefor.

LAND OFFICE DECISIONS.

The state's title to school lands under act of March 3, 1853, vests at the date of the completion of the survey, and if the land, although in reality mineral, was not then known to be mineral, the subsequent discovery of its mineral character will not divest the title which had already passed. But if the state makes indemnity selection in lieu of such land, it thereby waives any claim to it. *Rice v. California*, 24 L. D. 14 (1897).

Marble is mineral within an exception from school land grants. The term has the same meaning here as in the mineral land law. *Pacific Coast Marble Co. v. Northern Pac. R. Co.*, 25 L. D. 233 (1897).

"Without passing upon the question here, it would seem that under the grant and the provisions of the last mentioned section, land known to be mineral in character prior to the Secretary's approval of the State's list therefor, and possibly prior to certification, would be exempt from the operation of the grant. It would be the duty of your office, as it might become the duty of the Department in due course of proceedings, upon proper showing that land selected by a State under said act was mineral in character, to order a hearing in the premises, notwithstanding the selection had been approved and certified, to the end that, in the event evidence adduced at a hearing should so warrant, it might be duly determined that the land was not of the character contemplated by the act and was not intended to be granted thereby, and that, therefore, no title or interest had passed to the State by the approval and certification. But after such approval and certification a hearing should be ordered only upon a strong prima facie showing that the land was known, prior to that time, to be of a character other than that contemplated by the act.

"I do not think such showing is made in this case by the evidence presented by Arnold and hereinbefore set out—no facts being stated as a basis for the alleged knowledge of the existence of coal prior to the State's selection of the land—and his present request for a hearing is therefore denied. But this will not preclude him from presenting to your office, within a reasonable time, an application for a hearing, if he elects so to do, accompanied by such further evidence as he may be able to present in support thereof." *Simon B. Arnold*, 24 L. D. 486 (1897).

The grant of land for school purposes in § 6 of act of Congress of July 16, 1894, to the state of Utah, took effect upon the admission of that state to the Union, viz., Jan. 4, 1896. Though the act contains no exception of mineral lands, yet known mineral lands did not pass by the grant, both by reason of the general policy of the government and by the provisions of Rev. St. 2318 that "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." *Utah v. Allen*, 27 L. D. 53 (1898).

"The mere fact that the land was covered by a placer location or was embraced in a pending application for a placer patent did not constitute a disposition thereof or except it from the State's grant, if, in fact, it was not mineral land."

In a contest between the placer claimant and the state, judgment was given in favor of the state. The present case was an application for homestead. Held, if the land was nonmineral it passed to the state; if mineral it was not open to homestead entry. *George M. Bourquin*, 27 L. D. 289 (1898).

Prior to the approval of a school indemnity selection the land included therein, if mineral, is open to exploration and purchase under the mineral land laws. It is of no consequence that the land was not known to be

mineral when the state's application was filed. *Suank v. California*, 27 L. D. 411 (1898).

Coal and mineral lands are not subject to selection by the state under § 7 of act July 16, 1894, but "building stone" lands may be taken thereunder. *State of Utah*, 29 L. D. 69 (1899).

Land chiefly valuable for deposits of gypsum and petroleum is not subject to selection as indemnity under a school land grant. Prior to the approval of a school indemnity selection under act March 3, 1893, the land included therein, if mineral, is open to exploration and purchase under the mining laws. *McQuiddy v. California*, 29 L. D. 181 (1899).

"A grant of school lands to a State does not carry lands known to be chiefly valuable for mineral at the time when the State's right would attach, if at all. A mere mineral return by the surveyor general, however, does not have the effect to establish the character of lands as chiefly valuable for mineral, and cannot, therefore, in and of itself, operate to take lands out of the grant to the State, as mineral lands. This could only be done by proof clearly showing that the lands were, at the time when the right of the State would attach, known to contain valuable deposits of mineral, and to be chiefly valuable on account of such deposits."

By the Circular of March 6, 1903, 32 L. D. 39, in the absence of claims under the mining or other public land laws, asserted at the date when the right of the state would attach, the presumption arises that title has passed to the state, and this presumption prevails unless and until it is overcome by satisfactory proof to the contrary as provided in that circular. *State of Utah*, 32 L. D. 117 (1903).

Under the provisions of § 6 of the act of July 16, 1894, granting lands to Utah for school purposes, the right of the state does not attach until the land is identified by the government survey. In this case, the land was located as a mining claim in 1894, it was surveyed in 1899, and in 1901 the locator applied for patent of which actual notice was given to the state. The location did not establish the character of the land, but since the state did not interpose any objection by way of protest or otherwise, a hearing was held to be unnecessary and the mineral entry was passed to patent. *Mahogany No. 2 Lode Claim*, 33 L. D. 37 (1904).

The grant of sections sixteen and thirty-six made to the state of South Dakota for school purposes by the act of February 22, 1889, took effect on the admission of the state into the Union, as to lands at that date identified by the government survey; but as to lands not then surveyed, the right of the state did not attach unless and until identified by survey. If at the time of survey they were known to be mineral in character, they were excepted from the grant. *South Dakota v. Trinity Gold Min. Co.*, 34 L. D. 485 (1906); *South Dakota v. Delicate*, 34 L. D. 717 (1906).

The fact that only a portion of a mining claim conflicts with the school grant, and that portion is not asserted to contain any mineral deposits, does not prevent the application of the foregoing rule. It may still be claimed and held under the mining laws. *South Dakota v. Delicate*, 34 L. D. 717 (1906).

Where the mineral character of a mining claim in conflict with a section claimed by the state under its school land grant is challenged by the state, the usual formal proofs under patent proceedings will not suffice, but the mineral character of the land must be established by substantive proof, and the state is not bound to take the initiative at a hearing ordered to determine that question. *South Dakota v. Walsh*, 34 L. D. 723 (1906).

III. LAND GRANTS TO RAILROADS.

p. 532.

United States.

Northern Pac. R. Co. v. Sanders, 166 U. S. 620, 41 Law. Ed. 1139 (1897), affirming 49 Fed. 129 (see vol. 1, p. 534). The general route of the railroad was filed February 21, 1872, and its line of definite location was established and a plat thereof filed July 6, 1882. The lands in dispute were within the exterior lines of both these routes. These lands were located as placer claims and application for mineral patents therefor were made in 1881 and 1882. Protests were filed by the railroad company on the ground that the lands were not mineral and this contest had not been disposed of on August 4, 1887, when the railroad company presented a list of lands to the register and receiver of the proper land office for certification. Approval of this list was refused because of the existence of the above claims. The answer in this case admitted that the "said premises did not contain gold or other precious metals in paying quantities or in such quantity as to make the same, or any part thereof, commercially valuable therefor."

Held, that the above facts constituted a good defense to an action by the railroad company to recover these lands. They were included in the exclusion from the grant to the railroad of "other claims or rights at the time the line of said road is definitely fixed."

"Hence it was said in *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 320, 38 Law. Ed. 992, in which case the act of 1864 was construed, that the privilege of exploring for mineral lands was in full force at the time of the location of the definite line of road, and was a right reserved and excepted out of the grant at that time.

"In this view—of the soundness of which we entertain no doubt—it would seem to be clear that the formal applications made in 1880 and 1881, under the statutes then and still in force, to purchase these lands as mineral lands, were 'claims' within the meaning of the third section of the act of 1864. It was admitted by the demurrer that applicants made oath, before the proper officer, that they had discovered mineral thereon and had located the said quarter section as mineral land, and claimed the same as having valuable mineral deposits thereon. Upon the present record it cannot be said that those applications were not made in good faith. Whether the lands sought to be purchased as mineral lands were of that character

was a matter for the determination, in the first instance, of the Land Department; and there was jurisdiction in that department to pass upon every question arising upon applications to purchase them as mineral lands. How then can it be said that such applications, filed and of record before the definite location of the road, were not 'claims' within the meaning of the act of 1864? As the lands in question were not free from those claims at the time the plaintiff definitely located its line of road, it is of no consequence what disposition was or has been made of the claims subsequent to that date." See *Sanders v. Northern Pac. R. Co.*, 25 L. D. 72 (1897).

Menotti v. Dillon, 167 U. S. 703, 42 Law. Ed. 333 (1897), reversing *McLaughlin v. Menotti*, 105 Cal. 572, 38 Pac. 973, 39 Pac. 207. The California court held that the words printed in § 4 of the act of July 2, 1864, 13 St. 356, c. 216, making a grant to the Central Pac. R. Co. "the improvements of any bona fide settler or any lands returned and denominated as mineral lands," should read "on any lands," etc. The supreme court found it unnecessary to consider this.

United States v. Central Pac. R. Co., 84 Fed. 218 (1898). C. C. N. D. Cal. When land was known to be mineral at the time of the definite location of the railroad and at the time of the issuance of patent to the railroad company, that patent will be canceled at the suit of the government on the ground of mistake.

United States v. Central Pac. R. Co., 93 Fed. 871 (1899). C. C. N. D. Cal. In a suit in equity to cancel a patent issued under a railroad grant on the ground that the land was mineral "to overcome the presumption that a patent to public lands was issued upon sufficient evidence, clear and convincing proof must be produced, and, in the consideration of the mineral character of the land, not only must it satisfactorily appear that it was known mineral land other than coal or iron at and prior to the issuance of the patent, but it must be more valuable for mineral than agricultural or other purposes." The evidence in this case was not sufficient to overcome the presumption in favor of the patent.

Northern Pac. R. Co. v. Soderberg, 188 U. S. 526, 47 Law. Ed. 575 (1903). Land chiefly valuable for a deposit of granite suitable for building stone is mineral within the meaning of the act of July 2, 1864, excepting mineral land from the grant to the Northern Pac. Railroad Company.

"We do not deem it necessary to attempt an exact definition of the words 'mineral lands' as used in the act of July 2, 1864. With our present light upon the subject it might be difficult to do so. It is sufficient to say that we see nothing in that act or in the legislation of Congress up to the time this road was definitely located which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject. Indeed, we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture."

United States v. Northern Pac. R. Co., 170 Fed. 498 (1909). C. C. D. Mont. The act of Congress of March 2, 1899, c. 377, 30 Stat. 993, creating the Mount Ranier National Park, provided that the Northern Pacific Railroad Company, upon releasing land in the reservation created by the act theretofore granted to it by the United States, might select "an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey." It was held that coal lands are not nonmineral lands within the meaning of this act, and that the railroad company was confined in its selection to nonmineral lands and might not select lands known at the time to contain valuable mineral deposits, although they were classified as nonmineral at the time of actual government survey. (*Davenport v. Northern Pac. R. Co.*, 32 L. D. 28, disapproved.)

California.

Southern California R. Co. v. O'Donnell, 3 Cal. App. 382, 85 Pac. 932 (1906). The act of Congress of March 3, 1875, granting to railroads the right of way through the public lands, imposes the obligation of filing within a fixed time a profile of the road, which when approved by the secretary of the interior is to be noted on the plats in the local land office, and thereafter lands over which such right of way shall pass shall be disposed of subject to such right. Until a map of definite location is so filed and approved, those lands are open to location. Therefore, although the plaintiff corporation came into existence one year prior to defendant's location of his mining claim, its failure to secure approval of its map until two years later secured a good title to defendant.

Colorado.

Bonner v. Rio Grande Southern R. Co., 31 Colo. 446, 72 Pac. 1065 (1903). Where a railroad company ran its road through a mining claim, which was subsequently abandoned, the railroad company was not thereupon obliged to refile its map in the land office in order to acquire the right of way. The company took an easement, not only over the land which was unappropriated at the time its right attached (under the provisions of act of March 3, 1875, § 1, 18 Stat. 482, c. 152; U. S. Comp. St. 1901, p. 1568), but across the land which was restored to the public domain after the filing of its map of definite location. Therefore, when the locator of the mining claim abandoned it, the right of the railroad company attached, and any subsequent location of the mining claim was made subject, necessarily, to the easement of the railroad company.

Montana.

Traphagen v. Kirk, 30 Mont. 562, 77 Pac. 58 (1904). In order to make a valid location of a mining claim, surface ground, including the vein or lode, must be appropriated, and such surface ground must belong to the

United States. Therefore, where the surface ground has been patented by the United States to a railway company, no location of a mining claim can be made thereon. Besides an entry by another person seeking to locate a mining claim thereon is a trespass, and a valid mining claim cannot be initiated by the commission of a trespass. Where congress has provided for the disposition of various classes of public lands, and has authorized the officers of the land department to ascertain the character of such land and issue patent therefor, the determination of that department as to the character of land is, in the absence of fraud, imposition or mistake, conclusive.

LAND OFFICE DECISIONS.

Title to indemnity lands does not pass until the selection has been approved by the secretary, and in the meantime such lands, if mineral, are open to location. *Walker v. Southern Pac. R. Co.*, 24 L. D. 172 (1897).

Marble is mineral within an exception from a railroad grant. The term has the same meaning here as in the mineral land law. (See vol. 1, p. 540, *Tucker v. Florida R. & Nav. Co.*, 19 L. D. 414 overruled.) *Pacific Coast Marble Co. v. Northern Pac. R. Co.*, 25 L. D. 233 (1897). See *Northern Pac. R. Co. v. Soderberg*, 188 U. S. 526, 47 Law. Ed. 575, on page 561.)

A plat of station grounds covering land embraced in a prior mineral application cannot be approved; but the use and occupancy of such lands for station purposes will protect the right of the company, as against subsequent claimants, if the mineral application is abandoned. *Montana Cent. R. Co.*, 25 L. D. 250 (1897).

Fire clay is mineral and within an exception from a railroad grant. *Aldritt v. Northern Pac. R. Co.*, 25 L. D. 349 (1897).

Petroleum is a mineral within an exception from a railroad grant. *Union Oil Co.*, 25 L. D. 351 (1897).

Lands valuable for deposits of phosphates are mineral and are excepted from the grant to the state of Florida of May 17, 1856, although not expressly excluded therefrom, it being the settled and uniform policy of the government to reserve mineral lands from grants to states and corporations unless expressly included therein. *Florida Cent. & Peninsular R. Co.*, 26 L. D. 600 (1898).

Nonmineral land is not excepted from the grant to the Northern Pacific Railroad by reason of a "claim" under the mining laws, unless the claim is one which has been asserted before the local land office and is pending of record there at the time the line of the road is definitely fixed. (*Northern Pac. R. Co. v. Sanders*, 166 U. S. 620, 41 Law. Ed. 1139, distinguished.) *Northern Pac. R. Co. v. Allen*, 27 L. D. 286 (1898).

See the following cases on page 436. *McCloud v. Central Pac. R. Co.*, 29 L. D. 27 (1899); *Bedal v. St. Paul, etc., R. Co.*, 29 L. D. 254 (1899); *Luthye v. Northern Pac. R. Co.*, 29 L. D. 675 (1900).

Lands chiefly valuable for deposits of marble and slate are mineral within the exception in the grant to the railroad and are therefore not subject to indemnity selection thereunder. *Schrimpf v. Northern Pac. R. Co.*, 29 L. D. 327 (1899).

Lands chiefly valuable for deposits of asphaltum are mineral and are not subject to selection as indemnity under a railroad grant from which mineral lands are excepted. *Tulare Oil & Min. Co. v. Southern Pac. R. Co.*, 29 L. D. 269 (1899).

Lands which have an actual value for the deposits of limestone contained therein, and are more valuable on account of such deposits than for agricultural purposes, are mineral lands within the meaning of the United States mining laws, and therefore within the meaning of the act of February 26, 1895 (28 Stat. 683), providing for the classification of lands granted to the Northern Pacific Railroad Company. *Morrill v. Northern Pac. R. Co.*, 30 L. D. 475 (1901).

The department, in determining a case arising upon a protest filed against a classification under the act of February 26, 1895 (28 Stat. 683), providing for the classification of lands granted to the Northern Pacific Railroad Company, will apply substantially the same test that the commissioners are directed to apply to an ordinary contest involving the character of land, with this exception, that in cases of the former kind, by the express provision of the statute, "where mining locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as prima facie evidence that the forty-acre subdivision within which it is located is mineral land," a presumption which is not made in ordinary cases of conflict as to the character of land. The test is whether, giving due consideration to the adjacent country and to the reasonable probabilities, "the land is shown to contain mineral in sufficient quantity and of such value as to justify a person of ordinary prudence in the further expenditure of his labor and means in an effort to extract it, with a reasonable prospect of success in developing a paying mine." *Holter v. Northern Pac. R. Co.*, 30 L. D. 422 (1901).

Coal lands are mineral lands and as such may not be selected by the Northern Pacific Railroad Company under § 3 of act of March 2, 1899 (30 Stat. 994), which authorizes that company to select "non-mineral public lands, so classified as non-mineral at the time of actual government survey," in lieu of lands relinquished under the provisions of the act referred to. *Brown v. Northern Pac. R. Co.*, 31 L. D. 29 (1901).

Under § 5 of the act of March 3, 1887, by which bona fide purchasers from a railroad company of lands "for any reason excepted from the operation of the grant to said company" were given the right to purchase the same from the government, the bona fides of the purchase is to be determined by the conditions prevailing at the time of the purchase from the company. "The known character of the land at the date of the purchase from the company is therefore the determining factor in any controversy involving the character of the land applied for under the provisions of the said section." To except it from purchase on the ground of its being

mineral, it must have been known to be such at the date of the sale by the company. *Clogston v. Palmer*, 32 L. D. 77 (1903).

There is no authority for the insertion, in patents issued under railroad grants, of the clause "excepting all mineral land, should any such be found in the tracts aforesaid," and directions are given to exclude this excepting clause from all future railroad land grant patents. It is the duty of the department to determine whether lands are excepted from a railroad land grant because mineral in character; and the issue of a patent under such a grant is a determination that the lands patented are non-mineral. *Northern Pac. R. Co.*, 32 L. D. 342 (1903).

The classification of land under the act of February 26, 1895, § 6, does not take effect, has no binding force and is in no sense final, until approved by the secretary of the interior. He may disapprove the classification made by the commissioners, even where no protest is filed, if it appears that the classification does not correctly represent the character of the land.

That act does not have the effect of suspending mineral locations made prior to its passage, nor does it apply to cases where, pending the approval of the classification, claimants under the mineral law have established prima facie, under patent proceedings, the mineral character of the land and their claims have passed to entry. *Northern Pac. R. Co. v. Ledoux*, 32 L. D. 24 (1903).

Lands classified as mineral under the provisions of the act of February 26, 1895, are not subject to selection by the Northern Pacific Railway Company under the provisions of the act of July 1, 1898. *Northern Pac. R. Co. v. Frei*, 34 L. D. 661 (1906).

The term "mineral lands" in the exception from the grant to the railroad company made by the act of July 27, 1866, includes lands valuable for saline deposits. *Elliott v. Southern Pac. R. Co.*, 35 L. D. 149 (1903).

Lands classified as mineral under the act of February 26, 1895, may be selected by the Northern Pacific Railway Company under the provisions of the act of March 2, 1899 (30 Stat. 993), if otherwise within the terms of that act. *State of Idaho v. Northern Pac. R. Co.*, 37 L. D. 135 (1908).

For the rules and regulations governing the classification of lands under the act of February 26, 1895 (28 Stat. 683), see *Instructions* of July 26, 1910, 39 L. D. 113.

The railroad company having listed certain land under its grant, a hearing was had by which it was found to be mineral and the listing was canceled in 1897. In 1909 a homestead application was filed for this land, and upon a hearing then had as to its character it was determined to be non-mineral. It was held that the land passed to the company under its grant, and could not be entered by the agricultural claimant. *Oregon & Cal. R. Co. v. Puckett*, 39 L. D. 169 (1910).

IV. HOMESTEAD AND PREEMPTION GRANTS.

p. 540.

United States.

United States v. Puschel, 116 Fed. 642 (1902). D. C. S. D. Cal. A patent granted on a homestead entry to lands which are in fact mineral lands is not void, and cannot be collaterally attacked. Persons who, knowing land to be mineral land, seek to obtain title thereto through homestead entry, are indictable for conspiracy to defraud the government of the title to and possession of such land.

Steele v. Tanana Mines R. Co., 78 C. C. A. 412, 148 Fed. 678 (1906). See this case on page 269.

Alaska.

Heine v. Roth, 2 Alaska, 416 (1905). While the inception of the homestead right in Alaska is informal, the effect of making such an entry is to segregate the tract of land from the mass of the public domain and reserve it for disposal under the homestead laws. When once a homestead entry is allowed, no other claim of any kind could be permitted to attach to the tract until, after notice and hearing, the homestead entry is canceled by the land office. This rule prevails against attempted locations under the mining laws.

Arizona.

Blackburn v. United States, 5 Ariz. 162, 48 Pac. 904 (1897). Under Rev. St. 2258, no lands upon which are situated any known salines or mines are subject to preemption. To defeat a patent acquired under the preemption act, the existence of valuable minerals must have been known at the time of entry. Such a patent will not be canceled because a mine had been opened on the land prior to the entry and the existence of mineral shown, where the evidence was conclusive that every one who had worked the mine had found it unprofitable.

California.

Standard Quicksilver Co. v. Habishaw, 132 Cal. 115, 64 Pac. 113 (1901). Rev. St. 2318 provides that "In all cases lands valuable for minerals shall be reserved from sale." Whether lands are "valuable for minerals" within the statute is a question of fact, and a grant of lands as a homestead is an adjudication of its nonmineral character by the proper authority, viz., the land department, conclusive as against persons who had no interest in the land at the time the patent was issued, unless the land department had no jurisdiction to dispose of the lands. Conceding that the exception would allow the patent to be attacked if the applicant for a homestead

knew when he made his application that the land contained valuable minerals, it must be shown that he not only knew at that time that the mine existed, but also that he knew that it was valuable.

Oklahoma.

Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936 (1903). "Where a homestead entry has been made in good faith, after an examination by the entryman of the surface indications, and no evidence of minerals or oils discovered, the discovery of minerals or oils in such lands afterwards will not necessarily defeat his right to the land. Until he has made final proof, paid the land office charges and obtained his final receipt, the character of the land is open to inquiry, and if it can be shown by one making an adverse claim that the land is more valuable for mineral than agricultural purposes, the homestead entry may be canceled and the mineral location allowed. * * * The homestead entry may be attacked by contest or protest, and when the character of the land as mineral or non-mineral is put in issue, it must be determined by the land department, and the findings of that department on questions of fact are, as a general rule, conclusive on the courts. But this court has frequently held that a homestead entry entitles the entryman to the exclusive possession of the land embraced in his entry as against all persons except one asserting a superior or prior right." Injunction is the proper remedy to prevent trespassers from interfering with this possession of the entryman.

Plaintiff made homestead entry November 15, 1901. All Oklahoma lands being prima facie nonmineral, he made the necessary nonmineral affidavit, and his entry was allowed by the department. The defendant, without having made an actual discovery, located an oil placer claim on the same land on August 8, 1901. This was void because the president's proclamation of August 6, 1901, opening to settlement the land acquired from the Indian Tribes, provided that no person should be permitted to settle upon, occupy or enter any of the ceded lands until after the expiration of sixty days. The defendant made no further location, but attempted to operate for oil on the land after the homestead entry. It was accordingly enjoined.

LAND OFFICE DECISIONS.

A timber land entry can be defeated and entry canceled on the ground that the land is mineral if it was known to contain valuable mines at the date of entry. The burden of proof is on the contestant, and the test is not met by proof that the land had been previously located as mineral land and then abandoned and that subsequent to the timber entry other discoveries and locations were made. The requirement in the act of June 3, 1878, that a timber land applicant shall show that the land applied for contains no mining improvements, contemplates improvements on existing mining claims. *Chormicle v. Hiller*, 26 L. D. 9 (1898).

The right and title of an agricultural purchaser or entryman are not effected by discovery of minerals subsequent to the completion of his purchase or entry. *Aspen Consol. Min. Co. v. Williams*, 27 L. D. 1 (1898).

A mineral application should not be allowed for land embraced in a prior subsisting homestead entry, but a hearing will be ordered to determine the character of the land. *Elda Min. & Mill. Co.*, 29 L. D. 279 (1899).

The fact that proceedings by protest were not instituted until the expiration of more than two years from the date of issuance of homestead final certificate of entry does not preclude the department from inquiring into the known character of the land at the date of such entry and canceling the latter, if the evidence shows that at that date it was chiefly valuable for mineral. Section 7 of act of March 3, 1891 (26 Stat. 1095), has no application to such a case. *Herman v. Chase*, 37 L. D. 590 (1909).

V. INDIAN RESERVATIONS.

p. 545. By the act of Congress of June 28, 1898, 30 Stat. 495, whereby provision was made for the allotment in severalty of the land in the Indian Territory among the citizens of the respective tribes, there was a reservation of all the oil, coal, asphalt and mineral deposits to the tribe, and no allotment of land carried title to such deposits. The act also provided a system for the leasing of these deposits by the secretary of the interior for the benefit of the tribe to which they belonged.

United States.

United States v. Four Bottles Sour Mash Whiskey, 90 Fed. 721 (1898). D. C. D. Wash. E. D. Act of Congress of July 1, 1898, provided that "the mineral lands only in the Colville Indian reservation in the State of Washington shall be subject to entry under the laws of the United States in relation to the entry of mineral lands." A valid location of a mining claim upon this reservation has the effect to segregate such claim from the reservation and extinguish the Indian title thereto.

McFadden v. Mountain View Min. & Mill. Co., 38 C. C. A. 354, 97 Fed. 670 (1899), 9th Circ., reversing 87 Fed. 154 (1898). C. C. D. Wash. The president undoubtedly has the power to reserve lands of the United States for the use of the Indians, the effect of an exercise of such power being to exclude all intrusion upon the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes. The act of Congress of July 1, 1892 (27 Stat. 62), vacating and restoring to the public domain a portion of the Colville Indian reservation in the state of Washington, created by an executive order of President Grant on April 9, 1872, and opening the same to settlement and entry by the proclamation of the president, did

not in and of itself operate to restore said territory to the mass of public lands so as to admit of the immediate entry thereon by the public and the location of mining claims upon it under the mining laws of the United States. The mineral laws of the United States were not extended to said territory until the act of Congress of February 20, 1896. (29 Stat. 9.) (This case overrules *Collins v. Bubb*, 73 Fed. 735, vol. 1, p. 546.)

Southwestern Coal Co. v. McBride, 185 U. S. 499, 46 Law. Ed. 1010 (1902). The act of Congress of June 28, 1898, known as the Curtis Act, did not operate to deprive the lessors of coal mines in the Choctaw Nation of royalties due and owing to them for coal mined under valid leases prior to that date.

Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 Law. Ed. 183 (1902). Section 13 of the act of June 28, 1898, authorizing leases of mineral deposits in the Indian Territory by the secretary of the interior, is constitutional and a valid exercise of power by congress.

Gibson v. Anderson, 65 C. C. A. 277, 131 Fed. 39 (1904). 9th Circ. The president has the power by proclamation to reserve a portion of the unoccupied public land for an Indian Reservation, and his power is not abridged by Rev. St. 2319. Such a reservation by proclamation of the executive stands upon the same plane as a reservation made by treaty or by act of congress. Lands so reserved are not open to exploration and purchase as mineral lands.

McBride v. Farrington, 131 Fed. 797 (1904). C. C. W. D. N. Y. Under the acts of the Chickasaw National Legislature (Laws Chickasaw Nation, pp. 188, 190), and act of Congress of June 28, 1898, c. 517, § 13, 30 Stat. 498, leases of oil and mineral lands which had been allotted to the Choctaw and Chickasaw Nations, made for a limited term by such nations to non-citizens of such nations, reserving a royalty to the Indians, are not invalid.

Turner v. Seep, 167 Fed. 646 (1909). C. C. E. D. Okla. An oil and gas lease by an Indian on a form prescribed by the secretary of the interior provided that no assignment thereof should be made without the written consent of the lessor and the secretary, and any assignment without such consent would be void. An assignment consented to by the secretary but not by the lessor was void, and was not validated by a subsequent regulation of the department on the subject of assignments which contained no requirement of the lessor's consent.

Indian Territory.

Atoka Coal & Min. Co. v. Adams, 3 Ind. T. 189, 53 S. W. 539 (1899). The "Dawes Agreement" nullified agreements made with members of the Choctaw or Chickasaw Nations for permission to operate coal or asphalt leases, and provided that coal and asphalt mines in these two nations should be operated under the rules and regulations of the secretary of the interior, and the royalties therefrom paid into the treasury of the United States. The "Curtis Bill" (Act of Congress of June 28, 1898) declared

it unlawful for any person to receive any royalties on coal, oil or asphalt or other mineral, but provided that all royalties theretofore payable to the tribe should be paid into the treasury of the United States, to the credit of the tribe to which they belong. Held that the "Dawes Agreement" and the "Curtis Bill" were not retrospective, and therefore that members of the two nations could recover royalties due and payable to them when the "Curtis Bill" was passed.

Oklahoma.

Sharp v. Lancaster, 100 Pac. 578 (1909). An oil, gas and mineral lease is an "alienation" within the meaning of the act of congress of April 21, 1904, providing that "all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not now of Indian blood, except as to minors, are, except as to homesteads, hereby removed." (To the same effect is *Moore v. Sawyer*, 167 Fed. 826 [1909].)

Wyoming.

LeClair v. Hawley, 102 Pac. 853 (1909). Act of Congress of March 3, 1905, c. 1452, 33 Stat. 1016-1022, provided for the disposition of the lands of the Shoshone Indian Reservation ceded to the United States and forbade any person to settle upon, occupy and enter said lands, except as prescribed in the proclamation by the president, until after sixty days from the time they were opened to entry, by such proclamation. The proclamation also forbade all persons to settle upon, occupy and enter said lands except as prescribed in said proclamation until after sixty days from the time when the same were opened to entry. Held that an entry under the mining laws after the expiration of the sixty day limit was not invalidated because the person entering the same had been upon the land before the expiration of the sixty days, and had remained upon such lands or in close proximity to them until the expiration of the sixty day period.

Surplus lands in the Spokane Indian reservation classified as timber lands under § 2 of the act of May 29, 1908, are not subject to location and entry under the mining laws. *Instructions*, 39 L. D. 172 (1910).

LAND OFFICE DECISIONS.

Under the executive order of May 17, 1884, setting aside certain territory in Arizona as an Indian reservation, and containing the proviso that tracts "to which valid rights have attached under existing laws of the United States prior to date of this order are hereby excluded from this reservation," valid mining locations abandoned after the promulgation of the order do not thereupon become released from the operation of the proviso, but are excluded from the reservation and subject to relocation. *Navajo Indian Reservation*, 30 L. D. 515 (1901).

VI. FOREST RESERVATIONS.

The act of Congress of June 4, 1897, c. 2, contains the statement that it is not the purpose or intention of the acts providing for forest reservations to authorize the inclusion therein of lands more valuable for the minerals therein than for forest purposes. Provision is therefore made for the restoration to the public domain of lands in such reservations which are found better adapted for mining than for forest usage. "And any mineral lands in any forest reservation, which have been or which may be shown to be such, and subject to entry under existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry notwithstanding any provisions herein contained." Coal lands are mineral within the meaning of these provisions (T. P. Crowder, 30 L. D. 92 [1900]). Mineral lands in certain enumerated forest reservations in Colorado had been opened to location by act of February 20, 1896, c. 28.

The act of June 4, 1897, also provided that in cases in which a tract covered by an unperfected bona fide claim or by a patent was included within the limits of a forest reservation, the settler or owner thereof might relinquish the tract to the government and select in lieu thereof a tract of vacant land open to settlement not exceeding in area the relinquished land. These provisions, have, however, been repealed by the act of March 31, 1905, c. 1495 (33 Stat. 1264). (See Circular of May 16, 1905, 33 L. D. 558.)

United States.

Olive Land & Development Co. v. Olmstead, 103 Fed. 568 (1900). C. C. S. D. Cal. Selections in lieu of land relinquished to the government for forest reservation must, under act of June 4, 1897 (30 Stat. 11, 35, 36), be of land vacant and open to settlement at the time of selection. Although future disclosures cannot be taken into consideration in determining the character of the land, inquiry into its character at the time of selection may be made at any time prior to the issuance of the patent contemplated and required by the statute. "Vacant public lands are open to settlement under the laws relating to that subject when they contain no 'known salines or mines' whether of gold, silver, petroleum or other mineral." Land upon which no discovery of mineral has been made is therefore open to settlement and to such selection. It is immaterial that the land selected is in an oil district and has surface indications of oil, or that it was selected

with the idea that it contained oil, no oil having been actually discovered thereon and the land not having been withdrawn thereby from the unappropriated public lands.

Cosmos Exploration Co. v. Gray Eagle Oil Co., 50 C. C. A. 79, 112 Fed. 4, 61 L. R. A. 230 (1901), 9th Circ., affirming 104 Fed. 20. Lands may be selected in lieu of relinquished forest reserve lands covered by patent only when they are "vacant and open to settlement." Where land is in the possession of one prospecting for minerals, who is prosecuting such work with due diligence, even though no actual discovery has yet been made by him, the land is not "vacant" within the meaning of the statute, and the possession of the person so prospecting for minerals cannot be lawfully disturbed.

LAND OFFICE DECISIONS.

The act of June 4, 1897, authorizes lieu selection only of "vacant land open to settlement." "To be vacant the land must not be occupied by others. To be open to settlement it must not be known to be valuable for minerals or reserved from settlement for any other reason." The character of the selected land is to be determined by the conditions existing at the time when all the requirements necessary to obtain title have been complied with, and no change in those conditions subsequently occurring can affect the rights of the settler. "Vacant" is used in its primary or ordinary sense of unoccupied, and not as intended to describe land not taken or appropriated of record. The requirements above mentioned have been complied with when the selector has relinquished to the government the tract in the forest reservation and has submitted satisfactory evidence of the title thereto, has made his selection in lieu of the relinquished land, and accompanied that selection with proof showing the selected land to be subject to selection. *Kern Oil Co. v. Clarke*, 30 L. D. 550 (1901), 31 L. D. 288 (1902); *Kern Oil Co. v. Clotfelter*, 30 L. D. 583 (1901); *Bakersfield Fuel & Oil Co. v. Saalburg*, 31 L. D. 312 (1902).

The act of June 4, 1897, does not contemplate and therefore does not authorize the relinquishment or surrender of mineral lands as bases for the making of lieu selections. *Instructions*, 28 L. D. 328 (1899); *Instructions*, 31 L. D. 372 (1902).

The mineral character of the land at the time of its proposed relinquishment determines its acceptability under the exchange provisions of the statute. *Jeremiah Collins*, 32 L. D. 223 (1903); *H. H. Goetjen*, 32 L. D. 410 (1904).

The land department has authority of its own motion, or at the instance of others, to inquire into and determine whether mining claims within national forests were preceded by the requisite discovery, and whether the lands are mineral in character, although the locator has not applied for a patent.

"Many reasons are apparent why the land department, in a proper proceeding, upon due notice, with full opportunity for claimants to be heard,

should investigate such matters prior to application for patent, as well as when legal title is sought, if due occasion therefor arises in connection with the administration of laws applicable to the public domain. Clearly the consent or nonconsent of the parties claimant, their invocation of or failure to invoke the jurisdiction of the department, in no way affect or govern the general questions as to jurisdiction over the subject-matter. that is to say, the cause of action.

"As to public lands not valuable for their mineral deposits within national forests, the forestry reservation attaches absolutely and the government, through its proper executive officers, is entitled to the free and unrestricted possession and control of such area and the timber growing thereon, in order to properly administer the same as the law directs. Mining claims not asserted in good faith and not based upon any sufficient discovery of mineral interfere with and infringe upon the governmental right of possession, control and administration. In such cases a determination as to the character of the land and the validity of locations becomes essential and that duty devolves upon the land department. In a national forest, the government occupies a position, so far as the mining claimant is concerned, very similar to that of an individual claimant upon the open public domain under any of the nonmineral land laws, and the government is not without its remedy any more than the individual, when rights under the law are not respected."

"Charged as it is with the duty of administering the public domain and with disposing of lands therein to qualified applicants under the laws appropriate thereto, it is incumbent upon this department to see that the public lands are not withheld from use by the government or from acquisition by proper applicants, through invalid locations, filings or entries made without proper foundation and held without due compliance with law. While it is true, as urged by appellants, that this department has not the judicial authority to remove locators from their invalid claims, it has the power to declare such claims void and to refuse hereafter to recognize them as the basis for proceedings in the land department, and this course is not only required as a matter of administration but, as above indicated, is a power conferred by implication by those laws which charge this department with the proper disposition of the public lands." *H. H. Yard*, 38 L. D. 59 (1909).

CHAPTER XVII.

SPECIAL STATUTORY PROVISIONS FOR THE SALE OF PUBLIC LANDS CONTAINING PARTICULAR MINERALS.

I. Coal Lands.

II. Saline Lands.

I. COAL LANDS.

p. 548. The rules and regulations for carrying into effect the provisions of Rev. St. 2347-51, as set forth in volume 1 of this work, have been abrogated and replaced by the rules and regulations issued by the commissioner of the general land office on April 12, 1907 (35 L. D. 665). These as subsequently amended are printed in the Appendix.

The coal land laws were extended to Alaska by act of Congress of June 6th, 1900, 31 Stat. 658. By the act of April 28, 1904, 33 Stat. 525, amending the act of 1900, however, a distinct and special system of location and patenting of coal lands is provided for that territory, which is analogous to the general mineral land law. (These statutes and the regulations of the land office thereunder are printed in the Appendix.)

By the act of Congress of March 3, 1909, any person (the term "person" includes a state. State of Utah, 38 L. D. 245 [1909]) who has located, selected or entered under the nonmineral land laws public lands which subsequently are classified, claimed or reported as being valuable for coal, may, at his election, receive a patent therefor, with a reservation to the United States of the coal. Such reserved coal deposits are subject to disposal under the coal land laws, but no one may enter upon such lands to prospect for, or mine coal, without the previous consent of the owner, except upon such conditions as to security for and payment of damages to the owner as may be determined by a court of competent jurisdiction. Until such deposits are disposed of by the government, the land owner has the right to mine the coal for domestic purposes.

By the act of Congress of June 22, 1910 (36 Stat. 583), public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands or are valuable for coal, are subject to entry under the homestead laws, the desert land law, the Carey act, and to withdrawal under the reclamation act, with the reservation to the United States of the coal in such lands, and of the right to prospect for and mine and remove the same. The coal deposits in such lands remain subject to disposal by the government under the coal land laws, but, until such deposits are disposed of, the surface owner has the right to mine the coal for domestic purposes. Persons desiring to prospect for coal on such lands must first file with the secretary of the interior a bond or undertaking as security for the payment of damages to the crops and improvements on such lands. . (39 L. D. 179.)

United States.

Evans v. Durango Land & Coal Co., 25 C. C. A. 531, 80 Fed. 433 (1897). 9th Circ. See this case on page 471.

United States v. Keitel, 211 U. S. 370, 53 Law. Ed. 230 (1908), reversing 157 Fed. 396. D. C. D. Colo. Rev. St. 2350 prohibits a person who is disqualified from acquiring coal lands, because he has already purchased the full quantity permitted by law, from employing one who would be qualified if he made an entry in his own behalf, to make such entry ostensibly for himself, but really as agent for the disqualified principal and to pay for the land with the money of the principal under an obligation to turn over to him the land when title had been acquired. An agreement so to acquire title to coal lands is a conspiracy against the United States under Rev. St. 5440.

"The express command that the preceding sections shall be held to authorize only one entry by the same person or association of persons causes the grant to purchase not to embrace more than one entry by the same person, and as the right to purchase the coal land did not exist except by the authority conferred by the statute, it follows that the express provision excluding the right to do a particular act is both, in form and substance, a prohibition against the doing of such act."

(Followed in *United States v. Forrester*, 211 U. S. 399, 53 Law. Ed. 245; *United States v. Herr*, 211 U. S. 404, 406, 53 Law. Ed. 251, 252.)

Ghost v. United States, 94 C. C. A. 253, 168 Fed. 841 (1909). 8th Circ. "Subject to limitations not now in question it (the Federal statute). plainly invites individuals and associations to enter upon the public lands in search of coal deposits, to take possession of lands in which they find such deposits, and to expend time, labor and means in opening and developing them, providing only that there be an honest intent or purpose to purchase the lands according to the statute, if the coal proves to be such as to give character and value to them. And, this being so, it follows necessarily that any one

who, within the prescribed limitations, in good faith accepts and acts upon the statutory invitation with an intent or purpose so to purchase, must be regarded as in the exercise of a privilege conferred by law, and not as a trespasser."

"We entertain no doubt that a qualified individual or association who, in response to the government's invitation, enters upon public lands in search of coal deposits, and expends time, labor and means in an honest effort to open and develop such deposits when found, intending to purchase the lands according to the statute, if the coal proves to be such as to give character and value to them, becomes the owner of such coal as is extracted and removed as an incident only to the reasonable prosecution of that work."

G. having filed a declaratory statement, and continued development work until he satisfied himself that the deposit of coal was not sufficient to be profitable, permitted the year to expire without purchasing. The government sued for conversion of coal which he had taken out and sold. It was error to exclude evidence that the work done by G. was in good faith for the sole purpose of ascertaining whether the land was valuable for coal, and with the intent, if it was, of purchasing it during the life of the declaratory statement, that the work done was reasonably necessary to the proper ascertainment of the character of the land, and that the price obtained for the coal extracted and sold was less than the cost of extracting it and getting it to the place of sale. These facts, if proved, would have established a complete defense.

LAND OFFICE DECISIONS.

The price of coal land is dependent upon its distance from a completed railroad at date of entry and not at date of the application. *Allen L. Burgess*, 24 L. D. 11 (1897).

The time within which declaratory statement must be filed, where the filing when first offered is properly rejected on account of a defective township plat of survey, and is thereafter allowed on the correction of said plat, should be computed from the date when the corrected plat is filed.

The year given by Rev. St. 2350 within which purchase shall be made is to be computed from the expiration of the sixty days within which the declaratory statement may be filed and not from the date of the filing of that statement. Declaratory statement was filed one day after plat filed. Application for purchase was made one year and eight days thereafter. This was in time. *Rose v. Dinneen*, 26 L. D. 107 (1898).

A second coal land filing will be allowed where the first filing was abandoned because the coal therein was too poor to be merchantable and the good faith of the entryman is apparent. *Henry Burrell*, 29 L. D. 328 (1899).

The price of coal land is determined by the distance of the land from a completed railroad, irrespective of its distance from the nearest shipping point on such road. *Clinton S. Conant*, 29 L. D. 637 (1900).

The assignment of a right to purchase coal lands is recognized by the department when properly executed, and the good faith of the claimant is not affected thereby. The right to purchase coal lands is initiated by the actual discovery of coal on the land and the performance of some act of improvement sufficient to give notice to the world of an intent to purchase such lands as coal lands. The right cannot be initiated by the filing of a declaratory statement, and in case of conflicting claims the preference right is determined by priority of possession and improvement, and not by the date of filing the declaratory statement, unless the prior possessor has filed his declaratory statement out of time. *Reed v. Nelson*, 29 L. D. 615 (1900).

An entry of Alabama land reported valuable for coal prior to the act of March 3, 1883, and not thereafter offered at public sale, is within the confirmatory provisions of the proviso of § 7, act March 3, 1891, if there was no action in the nature of protest or contest against the validity of the entry for two years from the issuance of the receiver's receipt. *James G. Harris*, 28 L. D. 90 (1899).

Coal lands are mineral lands and as such are, when included in public forest reservations, subject to entry under the act of June 4, 1897. *T. P. Crowder*, 30 L. D. 92 (1900).

A preference right of entry under Rev. St. 2348 "accrues only to the person or persons who have opened and improved the mine or mines, and have the possession thereof. Once acquired, the right may be preserved and continued, by filing a declaratory statement under section 2349, until the expiration of the time within which proof and payment must be made under section 2350." "The office of the declaratory statement is to preserve the right, not to create it. If the right does not exist, the declaratory statement has no office to perform, and is without force or effect for any purpose."

An applicant to purchase under Rev. St. 2347 does not have to show that he has opened and improved a mine, or that he is in actual possession thereof. And one who has filed a declaratory statement may, nevertheless, file an application to purchase, upon which he may rest his claim, irrespective of any question of right under the declaratory statement. *McKibben v. Gable*, 34 L. D. 178 (1905).

This is applicable to an application by an association of four persons to purchase a tract of 640 acres of coal land. *Lehmer v. Carroll*, 34 L. D. 267 (1905).

Where an association of four persons has expended not less than five thousand dollars in working and improving a mine or mines of coal on the public domain, it is not necessary that they file a declaratory statement in order to acquire title to a tract of 640 acres. They may file an application to purchase without such declaratory statement. "If the privilege of postponing entry in the manner provided by sections 2349 and 2350, after a preference right of entry shall have been acquired under section 2348, be not desired by the claimants, the filing of a declaratory statement before application or entry is not necessary and is not required.

And in such a case, even were the claimants to fail to make application to enter and to pay for the lands within the sixty days allowed by section 2349 for filing the declaratory statement, neither their failure in this respect nor their failure to file a declaratory statement would operate to forfeit their right to purchase and enter the lands except in favor of some other qualified applicant." *Lehmer v. Carroll*, 34 L. D. 447 (1906).

In those states in which no right or title in the wife's property vests in the husband by virtue of the marital relation, she may, if otherwise qualified, purchase coal land in her own and exclusive interest; but the land department will require specific proof that she does not really purchase in the interest of her husband. *Jessie E. Oriatt*, 35 L. D. 235 (1906).

M. filed his declaratory statement more than sixty days after the date of his initiation of a preference right of entry; and after the presentation of his declaratory statement, but before his application to purchase, the land was included within the limits of a withdrawal by executive order. It was held that he had acquired his right before the withdrawal and should be permitted to complete his purchase. The failure to file declaratory statement within sixty days is not fatal to the applicant's right in the absence of an adverse claim intervening before the filing. "The office of the declaratory statement being to protect and preserve the previously acquired right for the definite term fixed by the statute, its absence exposes the land to other appropriation or disposition at any time after the initial period of sixty days; but upon the same considerations, and by the analogy of the preemption law, nothing else than the claimant's omission intervening, it would seem clear that the subsequent presentation of his declaratory statement should afford him the same security he would have enjoyed had he filed it within the time prescribed by the statute." In such case, however, the year within which he must purchase, under Rev. St. 2350, runs from the expiration of the 60 day period and not from the filing of the declaratory statement. In no event can the period during which his right to purchase is preferential or exclusive exceed fourteen months. *Charles S. Morrison*, 36 L. D. 319 (1908), reversing 36 L. D. 126.

Cleaning out old coal prospects, at an expense of twenty-five dollars, is not the opening and improving of a mine within the meaning of Rev. St. 2348. "Substantial steps, taken in good faith, looking to the creation of an operating and producing coal mine, are essential." *Esther F. Filer*, 36 L. D. 360 (1908).

The mere penetration of a bed of coal by means of a drill so small that the work cannot be utilized in the mining of coal from the land is not in itself the opening and improving of a mine within the contemplation of Rev. St. 2348, upon which a preference right of entry may be based. The office of the declaratory statement is not to create, but is solely to preserve a preference right of entry theretofore acquired by the opening and improvement of a mine or mines of coal. Therefore, if the right does not exist, the declaratory statement has no office to perform and is without force or effect for any purpose. *Thad Stevens*, 37 L. D. 723 (1909).

The question was propounded whether entries of coal land in Alaska might be completed and patents issued under the act of May 28, 1908, upon

locations made prior to November 12, 1906, in cases where some one of the following irregular or illegal agreements existed on May 28, 1908:

1. A verbal or written agreement between two or more entrymen, made prior to the initiation of the entry, that upon payment for the land and issuance of a cash certificate the entries should be transferred to a single company or corporation, and the different entrymen to accept stock in said corporations in payment for the land.

2. A contract conveying said lands to a company or corporation, in which the entryman had or expected to receive stock in payment for the lands.

3. Entries made under an agreement to convey, and conveyance made to a company or corporation which now offers to make cash entry under the act of May 28, 1908, by consolidating the said claims or locations so made.

4. A verbal agreement by two or more entrymen made prior to the initiation of the entry, that upon issuance of patent the entries would be consolidated and mined at the joint expense of each claimant, share and share alike.

The attorney general was of opinion that if the agreements were entered into by locators after they had made their locations in good faith and in their own interest alone, such locations might lawfully pass to entry and patent, but that if such agreements were entered into prior to such locations being made, such locations do not come within the provisions of the said act and cannot be lawfully passed to entry and patent. *Opinion*, 38 L. D. 86 (1909).

II. SALINE LANDS.

p. 564. By the act of Congress of January 31, 1901, 31 Stat. 745, the disposal of saline lands is brought into harmony with the general land system. By that act, all unoccupied public lands containing salt springs or deposits of salt in any form, and chiefly valuable therefor, are declared to be subject to location and purchase under the provisions of the law relating to placer claims. But the same person may not enter or purchase more than one such claim. The location notice, the application for patent, and the application to purchase such a claim, must each contain a specific statement under oath by each locator or applicant that he never has, either as an individual or as a member of an association, located, applied for, entered or held any other lands under the provisions of this act. (Circular of Feb. 13, 1901, 31 L. D. 131.)

LAND OFFICE DECISIONS.

Where one has acquired right to saline lands in Oregon under the provisions of the act of 1877, the state cannot acquire the same lands by selection under the grant to it by act of Feb. 14, 1859, and its amendments. It is confined to unappropriated lands. *Oregon v. Jones*, 24 L. D. 116 (1897).

There is no law authorizing the disposal of saline lands except the act of January 12, 1877, which is not applicable to Oklahoma. Saline lands in that territory are not subject to entry under the general land laws, the settled policy being to reserve saline lands and in the absence of statutory provision, the executive department being without authority to dispose of them by sale or lease. *A. H. Geissler*, 27 L. D. 515 (1898).

Saline lands in the Cherokee Outlet are not subject to reservation for public buildings by Oklahoma under proclamation of August 19, 1893, and act of May 4, 1894. *Oklahoma v. Brooks*, 29 L. D. 533 (1900).

The grant to the Territory of New Mexico for the benefit of its university of "all saline lands in said Territory" (§ 3, Act of June 21, 1898, 30 Stat. 484) includes only such lands as contain common salt or chloride of sodium in its various forms of existence or deposit, and in commercially valuable quantities. It does not include other salts of sodium and potassium and the associated gypsum minerals. *Territory of New Mexico*, 35 L. D. 1 (1906).

"Only with respect to the actual production of salt by the usual processes could a saline spring or deposit be consistently regarded within the purview of the mining laws." The use of the waters for bathing is not mining. *Lovely Placer Claim*, 35 L. D. 426 (1907). (See page 411, above.)

CHAPTER XVIII.

TITLE ACQUIRED BY STATUTE OF LIMITATIONS.

p. 568. Ordinarily the possession of the surface of land carries with it the possession of everything that is below the surface. When, however, the ownership of minerals in place is severed from the ownership of the soil or surface, a distinct possession is created, and the possession of the latter is not the possession of the former. It consequently follows that, after such severance of estates has taken place, the mere possession of the surface by the surface owner, or by his successor in title, or by a subsequent disscisor of the surface, is not adverse to the owner of the minerals. The latter must be disseised to lose his right, and there can be no disseisin by an act which does not actually take the minerals out of his possession. Any one, therefore, setting up the statute of limitations as against the owner of the mineral estate, whether that one be the surface owner or a stranger, must establish a possession of the mine as such independently of the possession of the surface. Where, however, the surface is in the possession of a disseisor who acquired the possession before the severance of the mineral estate, and at that time held the same adversely to the owner holding the paper title, his possession continues to be adverse to the grantee of the minerals who does nothing but record his deed.

United States.

Tyce Consol. Min. Co. v. Langstedt, (9 C. C. A. 548, 136 Fed. 124 (1905), 3d Circ. After the sale of the underlying coal and the severance of the estate therein from the estate in the surface, the continued occupation of the surface of the land by the lessor, the owner of the surface estate, and those claiming under him, cannot be made the basis of a title to the coal by adverse possession or the statute of limitations. See this also on page 37.

Tyce Consol. Min. Co. v. Langstedt, 69 C. C. A. 548, 136 Fed. 124 (1905), 9th Circ., reversing 121 Fed. 700, 1 Alaska, 439. The statute of limitations begins to run against a grantee of the United States only from the date he acquires title. Possession of a mining claim prior to patent proceedings is not and does not become adverse until patent issues. The rule is the same

for mining land as for agricultural land. "It is true that the locator of a mineral claim has, prior to the issuance of the final receiver's receipt, a broader control over his claim, and a higher estate therein than an entryman of agricultural land. But after full compliance with all of the conditions upon which a patent is authorized to be issued, there is no perceptible difference in the two estates. In cases where the question has been presented for adjudication, the courts have uniformly held that the statute of limitations does not begin to run against the claimant of a mining claim before his patent issues."

Tyce Consol. Min. Co. v. Jennings, 70 C. C. A. 393, 137 Fed. 863 (1905), 9th Circ., follows *Tyce Consol. Min. Co. v. Langstedt*, above.

Alabama.

Louisville & Nashville R. Co. v. Massey, 136 Ala. 156, 33 So. 896, 96 Am. St. Rep. 17 (1903). If one in possession of lands does not claim the mineral interest therein which had previously been severed from the ownership of the surface, his possession of the surface is not adverse possession of the minerals; that is, his possession of the land, being under a claim which did not embrace the minerals, was not adverse to the true owner, as to the minerals.

Arizona.

Costello v. Muhcim, 9 Ariz. 422, 84 Pac. 906 (1906). Actual, visible and continuous possession of a mine is not initiated and maintained by one who sinks deeper by six or ten feet a shaft of unstated depth already existing thereon, and thereafter does no other act upon the property for a period of seven years, in the absence of proof that this act would naturally attract the attention of the owner should he visit the premises. "We are not to be understood as holding that the quantity of work done is the standard, or that hostile acts must be renewed or repeated, in order to initiate and maintain adverse possession. But we hold that the hostile acts relied upon must be such as to carry with them a presumption that they would be observed by the owner, were he to visit the premises."

Arkansas.

Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87 (1902). Where one has been in possession of a mining claim, controlling and developing it, and holding adversely to all the world, for a time longer than the statutory period of limitation, the presumption is, as against all adverse claimants, that a location of the claim was regularly made.

Where the locator of a mining claim does not develop and maintain it and finally abandons it, and then another claimant takes possession and holds and develops it by work and labor performed, and holds adverse possession of the claim for a longer time than the period of limitation pre-

scribed by statute, his claim is thereby rendered valid against every one except the United States.

California.

Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., 114 Cal. 100, 45 Pac. 1047 (1896). Under Rev. St. 2332, the holding and working a claim without location for five years before any adverse claim is made thereto is equivalent to a valid location and confers the right of possession.

Fairbanks v. San Francisco & N. Pac. R. Co., 115 Cal. 579, 47 Pac. 450 (1897). Title may be acquired to a building under the statute of limitations although another person may have the title to the land upon which it is built. "For the purpose of adverse possession and the invocation of the statute of limitations, there may be cleavage of corporeal real estate horizontally as well as vertically; this appears from the cases relating to mineral strata and tunnels."

Baker v. Clark, 128 Cal. 181, 60 Pac. 677 (1900). If, after conveying a mining claim, the grantor remains in possession thereof, adversely to the grantee, for the period prescribed by Code Civ. Proc. §§ 323-325, he obtains a title to the claim by prescription.

Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261 (1904). A tenant in common of a mine cannot, by mere exclusive possession, acquire the title of his cotenant, unless such possession should be indicated to the cotenant by some notice, actual or constructive, to be hostile or adverse.

Colorado.

Cleary v. Skiffich, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207 (1901). The provisions of Rev. St. 2332 are not available in an action on an adverse claim. By the terms of the statute possession of a mining claim for a period equal to the time prescribed for the running of the statute of limitations is sufficient to establish a right to a patent in the absence of any adverse claim. This language implies that such possession is of no avail as against an adverse claim based upon a conflicting location.

Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57 (1903). The fact that one is in possession of a mining claim for a period equal to the time prescribed by the statute of limitations gives him title by adverse possession only to that portion of the premises which is embraced within the boundaries of the claim, and to such rights as attach thereto, but not to that part of a vein which apexes without the boundaries of the claim.

Idaho.

Bradley v. Johnson, 11 Idaho, 689, 83 Pac. 927 (1906). Defendant gave plaintiff his promissory note due in one year, secured by mortgage on unpatented mining property, and the note and deed were placed in escrow upon the condition that, if defendant paid the note, it with the deed should be returned to him, but if not, the deed was to be surrendered to plaintiff.

Before maturity defendant notified plaintiff that he would not pay the note, and shortly thereafter left the state for twelve years. At the end of the year plaintiff took possession of the property, claiming it as his own by virtue of the deed, and remained in undisturbed, open, notorious possession for twelve years, during all of which time he did the annual assessment work, and a large amount of development work. Held that by his laches defendant is bound and has no standing in a bill brought by plaintiff to quiet title.

Section 4036, Rev. St. Idaho, bars recovery of real estate by suit where neither plaintiff nor his ancestor, predecessor or grantor, were seized or in possession within five years of bringing suit. This section includes possessory rights to lands and mining claims. Open, notorious, adverse possession of an unpatented mining claim for a period of more than five years brings it under the provisions of this section and bars an action to recover its possession.

Illinois.

Henderson v. Virden Coal Co., 78 Ill. App. 437 (1898). H. leased to a corporation the exclusive right to enter upon a tract of land and mine and remove the minerals for the term of 999 years. The lessee sunk a shaft, but for more than twenty years neither it nor its successors in title entered upon or mined or removed any of the minerals. The plaintiff as devisee of H. filed a bill to have certain conveyances set aside as clouds upon his title, the defendants claiming under the above lease. The plaintiff set up among other things that the lessee and its assigns were barred by the statute of limitations, § 6, c. 66, Rev. St. 1845, to wit: "No person who now hath or hereafter may have any right of entry into any lands, tenements or hereditaments, shall make any entry therein but within twenty years next after such right shall have accrued, and such person shall be barred from any entry afterwards." This statute only refers to cases where a person has been disseised or where one is asserting a claim adverse to and inconsistent with the right of entry. Neither the lessor nor any one claiming under him had mined or removed any coal. There was consequently no disseisin. Nor was there any claim of right which was adverse to or inconsistent with the rights claimed by defendants under the lease. The plaintiff, therefore, could not invoke the statute as a bar.

Catlin Coal Co. v. Lloyd, 176 Ill. 275, 52 N. E. 144 (1898). "That the possession of the surface of a tract of land does not constitute the possession of the underlying coal and minerals, when the same has been severed, has been frequently judicially declared." "The conclusion, then, seems to be inevitable that coal and minerals in place, where the title thereto has been severed from the title to the surface, constitute land as fully as does the surface, and as such are subject to all the laws of possession and conveyance of real estate, and the owner thereof has all the rights of an owner in land, and may invoke every legal right to assert and defend his title that is provided for owners of title in fee to the surface,

and no reason is perceived why he should be denied the beneficial operation of our statute of limitations." Therefore coal and minerals in place, where the title thereto has been severed from the title to the surface, are to be deemed land within the meaning of that word in Rev. St. c. 83, §7, providing that when a person enters, under color of title, upon vacant and unoccupied land and pays the taxes thereon for seven successive years, he shall be adjudged to be the owner of such land.

Catlin Coal Co. v. Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216 (1899). After an owner of lands has conveyed away the coal and mineral underlying them, and thus has severed the estate in the coal and mineral from the estate in the surface, possession of the surface will not constitute a possession of the separate estate in the underlying coal and mineral. Therefore, under the statute of limitations, Rev. St. c. 83, §4, requiring actions for the recovery of lands "of which any person may be possessed by actual residence thereon for seven successive years" to be brought within seven years next after possession taken, a person who was merely in possession of the surface of the lands aforesaid was not thereby in possession of the estate in the underlying coal and mineral so as to claim title to the latter under said statute. Where the titles to the surface and to the underlying mineral are separate and distinct, and have not been reunited, neither is capable of possession by the mere occupancy of the other.

Missouri.

Gordon v. Park, 202 Mo. 236, 100 S. W. 621, 119 Am. St. Rep. 802 (1907). A conveyance of an undivided interest in a coal mine operates as a severance, by grant, of the coal from the land overlying it; and thereafter the mere possession of the surface does not carry with it or extend such possession to the coal. The holder of the paper title to the coal is entitled to recover the same, unless the owners of the surface have been in actual, open and notorious, exclusive, adverse, peaceable and hostile possession of the coal mine as such, independently of the possession of the surface, for more than ten years. The surface owner is in no better position than a stranger. Actual possession is taken by the opening of mines and carrying on of mining operations. "That possession is continuous if the operations are continuous, or are carried on continuously at such seasons as the nature of the business and the customs of the country permit or require. A cessation of operations in accordance with the customs of the neighborhood or from necessity occasioned by some natural agency would not be an interruption of the possession. But there must be something evidencing possession in the interval which connects the operations when resumed with those which have gone before, to distinguish such possession from a series of repeated acts of trespass." Followed in *Gordon v. Park*, 219 Mo. 600, 117 S. W. 1163 (1909).

Montana.

Casey v. Anderson, 17 Mont. 167, 42 Pac. 761 (1895). Patent issued for H. Lode in 1883. The United States brought an action to annul the same on the ground of fraud and judgment was rendered in their favor Dec. 29, 1887. On June 5, 1888, a new trial was ordered. Plaintiff claiming under the above patent brought ejectment, and defendants set up the statute of limitations. Held the running of the statute was not interrupted during the time that the judgment of the United States was standing. The statute was running not against the United States, but against the title of plaintiff.

That the statute runs against a mining claim only upon issuance of patent was decided in *Mayer v. Carothers*, 14 Mont. 274, 36 Pac. 182; *Clark v. Barnard*, 15 Mont. 176, 38 Pac. 834. (See vol. 1, p. 571.) This is agreed to by DeWitt & Hunt, J. J., only on the ground of stare decisis.

Horst v. Shca, 23 Mont. 390, 59 Pac. 364 (1899). Section 494 of the Code of Civil Procedure provides that "no action for the recovery of mining claims (lode claims excepted), or for the recovery of possession thereof, shall be maintained, unless it appears that the plaintiff or his assigns was seized or possessed of such mining claims within one year before the commencement of such action." Held that the words "mining claims" in this section do not include lands patented as placer ground but placer claims held by a mere possessory title, and therefore the adverse possession of real property for one year after it has been patented as placer ground does not bar the maintenance of an action for its recovery.

New Mexico.

Upton v. Santa Rita Min. Co., 14 N. M. 96, 89 Pac. 275 (1907). Possession of a mining claim for ten years, the time prescribed by the statute of limitations of New Mexico, is under Rev. St. 2332 sufficient to establish a right to a patent in the absence of any adverse claim. It is the equivalent of a valid location, but it does not relieve the possessor thereafter from the obligation to perform annual work.

Ohio.

Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433, 113 Am. St. Rep. 962 (1906). Where there has been a severance of the estate in the minerals underlying a piece of ground, the mineral right cannot be lost by mere non-user, nor by constructive possession under color of recorded deeds which are silent as to those rights. It can be lost by adverse possession only when that is actual, continuous, notorious and hostile. "It cannot be accomplished by secret trespasses upon the owner's rights, and it has been held that when there has been a severance of estates, neither the owner of the surface nor the owner of the mine can claim the other estate merely by force of the possession of his own estate." "A tenant in common cannot assert title by adverse possession against his co-tenant

unless he shows a definite and continuous assertion of adverse right by overt acts of unequivocal character clearly indicating an assertion of ownership of the premise to the exclusion of the right of the co-tenant."

Oregon.

Risch v. Wiseman, 36 Or. 484, 59 Pac. 1111, 78 Am. St. Rep. 783 (1900). The possessor of a mining claim in a mining district is presumed to be the owner thereof until the contrary appears, and where that presumption is supported by the fact that the plaintiff had held, occupied and possessed the ground in question under color of title, in pursuance of law and the local rules and regulations of the mining district, for more than 20 years prior to the attempted location of the defendants, it was not public mineral land of the United States at the time of the defendant's entry, and the plaintiff may enjoin the defendants from trespassing on the claim, even though there is no evidence of the transfer of the title of the original locators to the plaintiff.

Pennsylvania.

Finnegan v. Stineman, 5 Pa. Super. Ct. 124 (1897). The plaintiff being in adverse possession of land, the owners thereof sold the underlying coal to defendant, who recorded the deed, but did not go into actual possession. This did not stop the running of the statute of limitations.

"As between the parties to the instrument, and their privies, a conveyance of the underlying coal—the grantor retaining the surface—effects severance in title; under our statute the recording of the conveyance takes the place of livery of seizin, and the subsequent possession of the holder of each estate follows his right. But as between the grantee and a third party, who is in the actual, open, adverse, exclusive and peaceable possession of the land at the time, the recording of the instrument is not equivalent to an entry, and—there being no other interruption of his possession—when the full period of twenty-one years from its inception has elapsed his title to the land becomes perfect."

This case is distinguished from those that go before, in all of which the claim of title by possession of the surface had its inception after it and the underlying coal strata had been severed in title. "They were then two distinct possessions, the possession of the holder of each estate being referable to his title, unless by unequivocal acts that would give title to a stranger he has extended it upward or downward as the case may be." "But here disseisin of the coal as well as of the surface had actually taken place before their severance in title. One was as much out of the actual possession of the owner of the asserted legal title as the other."

Delaware & Hudson Canal Co. v. Hughes, 183 Pa. 66, 38 Atl. 568, 63 Am. St. Rep. 743, 38 L. R. A. 826 (1897). The plaintiff was as early as 1825 the owner of a considerable body of contiguous lands. A part of these was the Porter tract of 200 acres. The coal under this was opened between 1830 and 1835 and the operations thereunder were continuous to the present

time. In 1836 or 1837 M., from whom defendant derives title, entered upon a portion of the surface of this tract (six acres), began a residence and cultivated it. It was alleged that no coal had been taken from under these particular six acres. The possession of M. and his grantees was open, continuous, hostile and exclusive. At the suit of plaintiff, defendant was enjoined from mining.

Williams, J.: "If a trespasser enters either estate and maintains possession he can acquire title by the statute of limitations after twenty-one years to so much as he has actually held for that length of time; but his title will not extend above or below the estate on which he enters. If he would acquire any part of the mineral he must make his entry upon, and maintain his position within, the limits of the mineral estate, for the requisite period of time in an open, notorious, exclusive and continuous manner: *Caldwell v. Copeland*, 37 Pa. 427; *Armstrong v. Caldwell*, 53 Pa. 284; *Kingsley v. Hillside Coal & Iron Co.*, 144 Pa. 613, 23 Atl. 250. A covert or clandestine entry will not do. Such an entry will confer no right on the wrongdoer until his entry is, or by the exercise of due diligence might be, discovered by the owner. Until then the owner cannot know that his possession has been invaded. Until he has, or ought to have, such knowledge he is not called upon to act, for he does not know that action in the premises is necessary, and the law does not require absurd or impossible things of any one: *Lewey v. H. C. Fricke Coke Co.*, 166 Pa. 536, 31 Atl. 261, 45 Am. St. Rep. 684, 28 L. R. A. 283; *Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.*, 167 Pa. 136, 31 Atl. 484. Possession to be adverse must be open as well as continuous. The intruder must keep his flag flying in a visible and hostile manner: *Plummer v. Hillside Coal & Iron Co.*, 160 Pa. 483, 28 Atl. 853. So far on in our inquiry we have a well beaten path to travel, but from this point forward we are without any definite landmark to guide us. The real question presented is, may there be a severance of the mineral estate from the surface by the acts of the owners of the original freehold? And, if so, may there be a notice in fact of such severance to other persons that will affect them in the same manner as the constructive notice arising from the recording of a deed? * * *

The company had the right, however, to develop and operate the mineral estate alone, if that was to its interest, and leave the surface untilled and uncleared. It elected to do so. * * * In this manner it entered upon the actual possession of its mineral estate. For more than sixty years it has continued its possession without interruption in a manner that has been obvious to all persons in the neighborhood. No person could pass or enter upon the land without being confronted with the unmistakable proofs of the possession and active operations of the plaintiff company in this, its subterranean estate. These proofs, including the structures, the culm piles, the prepared coal, the movements of men and cars about the pit's mouth, brought the knowledge of the plaintiff's operations to even the most casual observer, in a much more effective and satisfactory manner than it could have been done by the mere existence of a recorded deed. Why should it not have the same legal effect? In this case there is still

another element of notice; for the defendant not only made his entry upon the surface with full knowledge from the acts of the owner of his severance and the occupancy of the lower estate by it, but he was in its employ, assisting in its mining operations. * * * As applicable to the facts now before us, we hold that the Porter tract, or so much of it as was accessible from the pit's mouth in use, so that coal could be mined and removed therefrom by the ordinary methods of mining, was in the actual possession of the plaintiffs, and that no enclosure upon the surface of that tract by one who had notice of the severance could draw to it any part of the mineral estate within its limits. This disposes of the suggestion that the unmined coal under the six acres has been, or could be acquired by McDonald by virtue of his possession on the surface. He acquired the surface because he put his actual possession against the constructive possession of the owner. He did not acquire the coal because he had actual notice of its severance from the surface by the owner. This limited his possession to the estate on which he entered."

Pierce v. Barney, 209 Pa. 132, 58 Atl. 152 (1904). One who secretly enters upon the coal underlying a tract of land through an opening made on adjoining land, and continuously mines the coal through such opening, does not thereby acquire title by adverse possession. "His manner of entering the appellees' premises was neither open, visible nor notorious, and hence was not of such a character as would suggest to the appellees that their possession of the coal under the land was being invaded by an adverse and hostile claimant. Such entry was covert and clandestine, and gave no notice to the appellees of a hostile claim to their premises, nor put them upon inquiry as to whether their coal was being mined by A."

Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991 (1904). Where the ownership of the coal underlying a tract of land has been severed from the ownership of the surface by reservation, notorious hostile possession kept up for twenty-one years will give title to an intruder, but mere unresented occasional trespasses will not. Where the owner of the coal left the state and never personally operated or mined the coal, no taxes were separately assessed against the coal, and whatever taxes were assessed were paid by the surface owners, and they and others at intervals took out some coal, but not continuously, there was not established the open, visible, notorious, exclusive and hostile occupation necessary to satisfy the statute of limitations. Adverse possession of a coal estate must be actual, as distinguished from constructive.

"There was no persistent continuance in the mining business at a single one of the several shallow banks; the owner of the surface exercised no exclusive ownership over the mining; not a single mine rail was laid, not a single mine car put in any bank. To hold this adverse is a perversion of every definition of adverse possession such as is necessary to give title to a trespasser under the statute of limitations. The best that can be said of it is, that at intervals during the year it was an open, visible trespass: and this was not exclusively confined only to the owner of the surface. It was not a continuous possession by even him for there was no possession

of the coal during the summer months. There was, so far as appears, no really hostile possession by the owner of the surface under a defiant claim of right. Such adverse ownership as this would not have divested the real owner whose title was of public record if the periodical trespass had run over a century. We are of opinion that the learned trial judge erred in submitting this evidence to the jury and instructing them that if they believed it, it showed abandonment or that it sustained the plea of the statute. But under the verdict, which is a general one, it divests the plaintiff of all the coal under the surface on that tract. Adjacent explorations have made it probable that under this Waynesburg seam is the Pittsburg seam, a much more valuable one. By the reservation Huss claimed title to all the coal and coal banks beneath the property; explorations long within the statutory period have pretty certainly demonstrated the existence of the Pittsburg seam; Huss when he made his reservation did not probably know of this seam. There is no evidence that even the scrambling possession of defendants touched this coal; even if the instructions had been correct as to the Waynesburg seam, the evidence wholly fails to sustain the verdict as to the Pittsburg seam."

Tennessee.

Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 66 Am. St. Rep. 740, 39 L. R. A. 249 (1897). Where the owner of the surface uses the land for agricultural purposes only, he has not such an adverse possession of the underlying minerals as is required in order to support a title under the statute of limitations. There must also appear to have been some denial of the right of the owner of the minerals or some assertion of claim inconsistent with his right.

Virginia.

Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593 (1906). See this case on page 50.

Steinman v. Jessee, 108 Va. 567, 62 S. E. 275 (1908). In 1874 Steinman purchased the mineral rights underlying certain lands of P., who at the time held the equitable title for the purpose of selling the land. Subsequently P. sold to Jessee the surface rights, J. taking with knowledge of S.'s prior purchase of the mineral rights. J. agreed to pay therefor what P. owed on the land, and in 1882, on a judicial sale to enforce collection of this promised sum, acquired title to the whole land. S. was not a resident of Virginia, but immediately after his purchase caused his deed to be recorded and paid taxes on the property. He never operated for minerals, but occasionally came to Virginia, looked over the property, and seeing that there was no actual adverse possession and not learning of any adverse claim, relied upon the covenant of general warranty in his deed. More than twenty-one years after his purchase he learned for the first time that J. claimed title to the minerals and within a year thereafter brought a bill to quiet title. Held that J. became a trustee holding the legal title to the

underlying minerals for the benefit of S., and will not be heard to set up against him the defense of laches, unless S. has slept on his rights for an unreasonable time after knowledge that J. was claiming title to both surface and minerals.

Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 S. E. 358 (1908). "It is a general presumption that one who has the possession of the surface of the land has the possession of the sub-soil also. But when, by conveyance or reservation, a separation has been made of the ownership of the surface of the land from that of the underground minerals, the owner of the former can acquire no title to the latter by his exclusive and continued enjoyment of the surface; nor does the owner of the minerals lose his right or possession by any length of non-usage. He must be disseized to lose his right, and there can be no disseizure by an act which does not actually take the minerals out of his possession." "Adverse possession of the land does not necessarily include possession of the minerals below it, where the title to the latter has been severed by deed from that of the surface."

Morison v. American Ass'n, 65 S. E. 469 (1909). "It is well settled that one may own the surface and another the minerals in the same parcel of land. Title to the freehold of either cannot be acquired by adverse possession of the other."

West Virginia.

McNceley v. South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562 (1903). Chapter 61, p. 152, Acts 1872-73, fixing three years' limitation for suits to recover land leased for oil or other minerals, was repealed by c. 102, p. 208, Acts 1882, re-enacting c. 104 of the Code of 1868.

Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485, 6 A. & E. Ann. Cas. 140 (1905). Possession of the surface for more than twenty-one years does not carry with it the possession of the coal below it, where the title to the mineral rights had been severed from that of the surface by deed. In such case the owner of the surface can acquire no title to the subsoil by his exclusive and continued enjoyment of the surface; nor does the owner of the minerals lose his right or his possession by any length of nonusage. He must be disseized to lose his right, and there can be no disseisin by an act which does not actually take the minerals out of his possession.

LAND OFFICE DECISIONS.

If an applicant for patent has been in possession and worked the claim for the period prescribed by the statute of limitations for mining claims in the state prior to its relocation by the protestants, he is entitled to have the same passed to title, as against protestants who, though they filed an adverse claim, did not bring action thereon. *Cain v. Addenda Min. Co.*, 24 L. D. 19 (1897).

The continuity of possession of a mining claim under the statute of limitations is not broken by a relocation made when there was no reason to justify it. *Stewart v. Rees*, 25 L. D. 447 (1897).

The main purpose of Rev. St. 2332 is to declare that evidence of the holding and working of a mining claim for a period equal to the time prescribed by the local statute of limitations for mining claims shall be considered as sufficiently establishing the location of the claim and the right of the applicant for a patent thereto, in the absence of any adverse claim. *Barklage v. Russell*, 29 L. D. 401 (1900).

Following this case it is held that there is nothing in the language of the statute nor in the regulations of the land office, to restrict the application of Rev. St. 2332 to cases where the applicant for patent is unable by reason of the lapse of time or the loss of mining records by fire or otherwise to furnish the required proof of possessory title. *Little Emily Min. & Mill. Co.*, 34 L. D. 182 (1905); *Capital No. 5 Placer Min. Claim*, 34 L. D. 462 (1906).

Rev. St. 2332 does not dispense with the requirement of Rev. St. 2325 that the expenditure of five hundred dollars in labor or improvements is a prerequisite to the issuance of patent. *Capital No. 5 Placer Min. Claim*, 34 L. D. 462 (1906).

CHAPTER XIX.

RIGHTS OF MINE OWNERS.

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| I. Working and Surface Rights. | III. Timber Rights. |
| II. Rights of Way. | IV. Tailings and Refuse. |
| A. Incident to the Grant or
Reservation, or Expressed
Therein. | A. Property Therein and Their
Deposit on the Land. |
| B. Given by Statute. | B. Pollution of Streams. |
| | V. Drainage. |

I. WORKING AND SURFACE RIGHTS.

p. 576. The surface rights of patentees of coal deposits on the public lands where title to the surface has been acquired by others under the terms of the act of Congress of June 22, 1910, are defined in that act. They may occupy so much of the surface as may be required for all purposes reasonably incident to the removal of the coal upon the payment of the damages caused thereby to the surface owner, or upon giving bond in an action instituted in a competent court to ascertain or fix such damages.

Georgia.

Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666 (1905). In the case of granite, where it is impossible to remove the mineral without disturbing the surface soil, and completely destroying the benefits accruing to the owner of the surface, if the ownership of the minerals is in one person and that of the surface in another, the former can only exercise his rights in taking out such granite as was exposed from one cause or another by the removal of the surface soil. See this case also under chap. XXI, div. I.

Indiana.

Ingle v. Bottoms, 160 Ind. 73, 66 N. E. 160 (1903). "When anything is granted, whatever is necessary or essential to the enjoyment of the grant is also granted. * * * The rights which arise by implication under said rule are only such as are necessary to the enjoyment of the grant. * * * Under this rule the grant of the right to coal carries

with it, as a necessary incident, the right not only to penetrate the surface of the soil for the coal, but also to use such means and processes for mining and removing the same from the premises as may be reasonably necessary. This includes the right to construct such road and railroad tracks on the surface of the land as are reasonably necessary for the transportation of supplies, machinery for the operation of the mine, and for removing the coal from the mine openings. * * * The question of how much of the surface is reasonably necessary for the proper operation of the mine is a question of fact, and not of law."

Where a lease provides that the lessee is to have the right to enter "upon the lands * * * for the purpose of mining coal and of conducting and operating to any extent he may deem advisable, but not to hold possession of said land for any other purpose, except one acre, more or less, for operating said mines, and for dwellings," the restriction of the lessee's possession for "other purposes" to one acre, more or less, cannot be held to limit the lessee's use of the surface for switches and roads to less than is reasonably necessary for the removal of the coal from the mines. "To construe the reservation as controlling the entire lease, and limiting the right expressly granted, and those which would be necessarily implied in order to effectuate the purposes of the grant, would * * * be practically to destroy the lease, and prevent appellant (lessee) from carrying out the true purpose of the same by mining all the coal under the land in a businesslike manner, and paying to appellee the royalty which would thereby come to him."

Iowa.

Moore v. Price, 125 Iowa, 353, 101 N. W. 91 (1904). When a deed conveys all the coal under the grantor's land, with the right to sink shafts thereon and mine it, this does not authorize the grantee to take coal mined on his own land through the grantor's land and up the shaft located thereon.

Kentucky.

Duncan v. American Standard Asphalt Co., 30 Ky. L. R. 84, 97 S. W. 392, 22 Am. St. Rep. 120 (1906). A deed of mineral rights gave the grantee "free access to said land from any direction by roads and other passageways or means of exit and entrance." "Under this grant the company would have the right to construct such roads, passways or means of exit and entrance as may be necessary to get out the mineral, having due regard to the interests of the owner of the soil and not inflicting upon him any unnecessary damage."

Missouri.

Gordon v. Park, 219 Mo. 600, 117 S. W. 1163 (1900). The grant of the coal underlying a tract of land carries with it the right to use the surface so far as is necessary to carry on mining operations.

Ohio.

Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6 (1907). The owner of the mineral estate has the right to use or remove such portions of the containing strata as may be necessary or proper for the convenient and proper removal of the mineral itself, having regard to the right of the surface owner to subjacent support.

Pennsylvania.

Electric City Land & Imp. Co. v. West Ridge Coal Co., 187 Pa. 500, 41 Atl. 458 (1898). Owner of a tract of one hundred acres conveyed the same to plaintiff, reserving the minerals "Provided that no mine or air shaft shall be intentionally opened or any mining fixtures established on the surface of said land." The tract was divided into city lots. Defendant acquired title to five of these lots and also to the minerals underlying the tract. Held that the above proviso was a covenant running with the land, and defendant will be restrained from using his lots for a shaft, etc. Mitchell, McCollum & Fell, J. J., dissent. (See criticism of this decision in 12 Harvard L. R. 356.)

Potter v. Rend, 201 Pa. 318, 50 Atl. 821 (1902). Plaintiff conveyed to defendant all the coal underlying a tract of 152 acres, "Together with the free and uninterrupted right into said coal and under said land, for the purpose of digging, mining and carrying away said coal; together with the privilege of mining and removing through any entries made in said coal, other coal belonging, or which may hereafter belong to" defendant, with the right also to "enter upon the said-surface of said land for the purpose of taking out and placing on the same, any material that may be necessary in operating the coal underlying said land; with the right to sink a shaft for the purpose of taking out the coal underlying said land at any point the said (defendant) may select; with the privilege * * * to buy at the mouth of said shaft three acres of surface, at the rate of \$75 per acre, and also with the right to make openings in the surface for ventilation or drainage; with the right to deposit on the surface, debris taken out in sinking shaft, etc."

Defendant owned or operated about 4,000 acres of adjoining coal land. During an occupancy of 17 years, he mined out all the coal under plaintiff's land except about 15 acres. In carrying on his operations he erected buildings and machinery, for use in mining not only under plaintiff's tract, but under adjoining land, and also dumped refuse from the mines under all the tracts. The buildings, machinery and dump covered 20 acres of surface. Held, (1) Defendant has the right not only to passage through the entries for coal brought from his other lands, but also to raise it to the surface on plaintiff's land. (2). He has no right to deposit refuse from other mines on the surface of plaintiff's land, and in depositing refuse from the underlying mine, he is limited to three acres of surface. Any appropriation beyond this quantity was a trespass. "Rend was not a tenant of the plaintiff; she subdivided her land horizontally; the division was into coal

and farm land; Rend did not lease the coal, but took an absolute conveyance of it; therefore, he took just what he got by his deed, the coal; no implied right to surface occupation as a tenant followed; as to surface right he took what was expressed in his grant." (3). The plaintiff having stood by for 12 or 15 years without making complaint, equity will not enjoin the removal of improvements by defendant.

Prigg v. Preston, 28 Pa. Super. Ct. 272 (1905). In order to establish the existence of a custom in an oil producing country permitting a lessee under an oil lease to erect on the land described in the lease a dwelling for the occupancy of his employes, it must be shown what oil producing countries are meant, the time when the custom began, and to whom and where such custom was known, and whether it was known to the parties at the date of the lease.

Where a party seeks to set up a custom which is not alleged to have existed for so long a time and so generally that it had become the recognized law of the land, it is proper to permit the opposite party to show that neither he nor other persons resident in the vicinity ever heard of the alleged custom, and that there was no such general custom in the region.

Cubbage v. Pittsburg Coal Co., 216 Pa. 411, 65 Atl. 797 (1907), reversing 29 Pa. Super. Ct. 341 (1905). The plaintiff conveyed to defendant's grantor all the coal under a tract of 31 acres, together with "the right to mine and carry away said granted coal and in so doing to exercise the usual and ordinary privileges of ventilation and drainage upon the land of said Joseph K. Cubbage, but in such manner as to do no unnecessary injury thereto, with the right also to transport other coal through underground entries made or to be made in the hereinbefore granted coal and over the railway hereinafter mentioned; also, a right of way for an inclined railway with the necessary appurtenances across the land of the said Joseph K. Cubbage from said granted coal to the Pittsburg & Steubenville Railroad, with the free and uninterrupted right to construct, maintain and operate the same; also, the use of one acre of land parcel of the tract aforesaid, at and about the pit mouth for a check house and other necessary and convenient uses in connection with mining operations, such as for deposit of timber, coal, slack, etc., but the same shall not be occupied by any dwelling houses; also, the use of such ground parcel of the tract aforesaid along the line of the Pittsburg & Steubenville Railroad as may be necessary and convenient for sidings, switches, etc., for the proper dispatch of business in loading and transferring coal." The habendum in the deed was as follows: "To have and to hold the said right of way, uses, easements and privileges unto the said party of the second part, his heirs and assigns, so long as he or the firm of Lyon, Short & Company, his or their heirs or assigns may have any coal, whether now owned or hereafter to be acquired, which can be brought by said route to the Pittsburg & Steubenville Railroad and the said described coal, hereby granted or mentioned and intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns, to and for the only proper use and behoof of the said party of the second part, his heirs and assigns forever, as the property of and in

trust for the firm of Lyon, Short & Company, according to the provisions of a certain deed relating to the real estate of said firm."

It was held that the defendant did not have the right to erect a ventilating shaft on the surface of the 31 acre tract for the purpose of ventilating the coal territory adjoining or surrounding it.

"In granting the right to transport other coal through entries made or about to be made in the granted coal no right is conferred of ventilating the territory from which such other coal might come, nor the entries beneath the 31 acres through which it might be transported. To the right to mine and carry away the coal granted, and to that right alone, is the privilege annexed of exercising the usual and ordinary privileges of ventilation and drainage upon the surface. In mining other coal no such right was granted. 'In so doing', that is, in mining and carrying away the coal granted, the ventilating privilege was granted, and this right, so clearly limited, is not to be extended by implication, even if ventilation is needed in mining other coal and the same may be transported through underground entries beneath plaintiff's surface. His right is to stand upon the words of the grant to Lyon, and the coal company must get the needed ventilation in some other way than by a trespass."

Baker v. Pittsburg, Carnegie & Western R. Co., 219 Pa. 398, 68 Atl. 1014 (1908). When an owner of land conveys it reserving "all the coal underlying the same, with all mining rights and privileges appurtenant thereto," she has the right to sink a shaft upon the land sold by her for the purpose of mining the coal which she has reserved. This is the established law in Pennsylvania. "In a recent case, *Youghiogheny River Coal Co. v. Allegheny Nat. Bank*, 211 Pa. 319, 60 Atl. 924, our Brother Mestrezat said (p. 324): 'If the owner of the whole fee conveys the coal in the land in general terms, retaining the residue of the tract, the purchaser acquires the coal with the right to mine and remove it, provided he does so without injury to the superincumbent estate.' The undoubted right of the owner of coal to mine and remove it was also expressly recognized in *Pringle v. Vesta Coal Co.*, 172 Pa. 438, 33 Atl. 690, and the principle that 'one who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as it is necessary to carry on his mining operations,' is laid down in *Turner v. Reynolds*, 23 Pa. 199."

Utah.

Park City Meat Co. v. Comstock Silver Min. Co., 103 Pac. 254 (1909). An easement is created where there was conveyed to a company owning mining claims the perpetual right to use adjoining tracts for a shaft and dumping grounds, and the company thereupon sank a shaft, made improvements thereon, and through it worked the claims as one mine, and the improvements placed thereon, together with the tracts, constituted an appurtenance to the mine, and under the law would have passed to the purchaser of the land without special reference thereto.

Virginia.

Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 105 Va. 785, 54 S. E. 884 (1906). Where a contract between lessor and lessee of a mine provided that lessor should have the right to use certain designated haulways through the leased mine, the limitation that the use of the haulways should not injuriously interfere with the operations of the lessee does not impair the lessor's right to the reasonable use of such haulways, but is effective only to protect lessee against lessor's abuse of such right. The right of the lessor to bring coal from adjoining land to the haulways on the demised premises was an essential incident to the right to transport the coal along such connecting haulways.

West Virginia.

Montgomery v. Economy Fuel Co., 61 W. Va. 620, 57 S. E. 137 (1907). A lease of a tract of land for coal mining purposes excepted the surface of a certain portion used as a cemetery. Even though reserved for a specific purpose, it was an absolute exception so far as the lessee was concerned. The lessee contended that it had full right to use the surface of this land whenever necessary for the enjoyment of the rights created by the lease, when such use did not interfere with the use of the surface as a cemetery. But "the very fact that it is excepted for a cemetery, with the common understanding of what a cemetery is, goes to show and proves conclusively that it was an exception for the exclusive and absolute benefit of the lessor, and to the entire and complete exclusion of the lessee."

Porter v. Mack Mfg. Co., 65 W. Va. 636, 64 S. E. 853 (1909). A reservation in a deed of land of certain minerals therein implies the right to penetrate the surface for the minerals, and to use such means in mining and removing them as are necessary; and where there is further the express reservation of the "right to mine and remove the same," equity will enjoin the owner of the surface from obstructing the mineral owner from a use of the surface for a tramway or other means of transportation fairly useful and necessary.

II. RIGHTS OF WAY.**A. Incident to the Grant or Reservation, or Expressed Therein.**

p. 584. The doubt expressed in volume 1, as to whether the right of the mine owner who has a fee in the minerals, to transport minerals from adjoining lands through the spaces vacated by his operations, existed after the exhaustion of the minerals, has been solved by the later cases. Upon the exhaustion of the minerals, the space formerly occupied by them reverts to the surface owner, and all rights of the mine owner therein cease.

In regard to the rights of way which the owner of a tunnel on the public domain may have through conflicting claims, see the cases under the title "Tunnel Claims." (Page 543, above.)

California.

Brookshire Oil Co. v. Casmalia Ranch O. & D. Co., 156 Cal. 211, 103 Pac. 927 (1909). See this case on page 78.

Iowa.

Madison v. Garfield Coal Co., 114 Iowa, 56, 86 N. W. 41 (1901). Plaintiff leased to defendants certain coal lands for the purpose of mining coal, and gave them the power to mine and remove all coal underlying said lands, the defendants to pay a certain royalty on all coal mined. The defendants were to have the right of way over the surface of the land for a railway track to the shaft, for which they were to pay \$20 per year rental, and were to have the right to use such right of way upon payment of such rental even after the coal had been exhausted from the plaintiff's land. The plaintiff reserved the surface of the land except as thus granted. Held that the defendants could, under this lease, use the right of way over the plaintiff's land for the purpose of running out coal from adjoining land, which the defendants had leased for mining purposes. Therefore the plaintiff could not claim additional compensation for such use.

Ohio.

Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6 (1907). The mine owner has the right to use as he may choose, but without injury to the owner of the soil, the space left by excavation of the mineral so long as it remains a mine, that is to say, until the mineral shall be practically exhausted. It results from the absolute proprietorship over the mineral in place that the owner thereof has a like interest in the containing chamber until the termination of the estate. The empty space is not merely property which may be used as an incident to the removal of the mineral included in the grant, but he may use the space, created by removal of mineral within the grant, as a way for the carriage of minerals from his adjoining lands, or he may cut a passage through the minerals and use it for the carriage of minerals from his other lands.

Pennsylvania.

Webber v. Vogel, 189 Pa. 156, 42 Atl. 4, 43 Weekly Notes Cas. 328 (1899). *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293, 22 Atl. 1035, 24 Am. St. Rep. 544, 13 L. R. A. 627, was not overruled by *Webber v. Vogel*, 189 Pa. 235, 28 Atl. 226 (see vol. 1, p. 589). It was held in that case "that in case of severance the title of the lessee was an estate in fee simple in the coal and while such an estate existed, the owner had the right to haul through

the gangways coal mined from other and adjoining land. While there were three dissents from that judgment, we have since strictly adhered to the principles announced in it; for eight years it has stood as the law, and has become a settled rule of property in the great mining regions of the commonwealth. In reliance upon it, capital has been invested and mining corporations organized. We are not disposed to disturb it; would not even if we doubted it. While this is our settled opinion, we do not intend that the rule in that case shall be extended beyond what was plainly decided."

"It was intended to go no further in the case cited than to hold that while the purchaser of the coal was in good faith mining out his coal, his right to the use of the space made vacant by his workings as they progressed could not be successfully obstructed by the owner of the surface; and not that by the purchase of the coal he obtained an undisputed and perpetual right of way under another's land. The owner of the land above and below has a right to the reversion of the space occupied by the coal within a time contemplated by the parties when they sever that peculiar part of the land from its horizontal adjoiners."

Springer v. Somers Fuel Co., 196 Pa. 156, 46 Atl. 370 (1900). Plaintiff owned a tract of land except an underlying vein of coal. The owner of the latter had taken out practically all of the coal except the ribs and pillars so that it was not profitable to mine any further quantity of coal. Under these conditions the defendant purchased the mineral estate and used the space that had been mined out for the transportation of coal mined on adjacent tracts. This was held to be a trespass on the plaintiff's estate. "While the purchaser and owner of the coal is in good faith mining out his coal, his right to the use of the space made vacant by his workings as they progress cannot be obstructed or interfered with by the owner of the surface; the purchase and ownership of the coal however does not give him a perpetual right of way under another's land; after his workings in the coal have practically ceased, he cannot use those workings for the purpose of reaching and transporting adjoining or other coal." No actual damage having been proved, however, plaintiff was only entitled to nominal damages.

Farrar v. Pittsburg & Eastern Coal Co., 28 Pa. Super. Ct. 280 (1905). Plaintiffs conveyed to defendant's grantor the coal underlying a certain tract of land, "Together with the free and uninterrupted right of way into, upon and under said land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, coking, ventilating, draining and carrying away said coal, etc., (hereby waiving all surface damages of any sort arising therefrom, or from the removal of all of said coal), together with the privilege of mining and removing through said described premises, other coal belonging to the said party of the second part, its successors and assigns, or which may hereafter be acquired." In order to ship the coal mined from under this tract as well as coal mined in other land, defendant constructed a railway on the surface to connect with the road of a main railroad. This it was held the defendant had no right to do. It was not conferred by the deed. The

privilege therein given of removing other coal "through said described premises" was a privilege to carry through the granted premises, that is the coal veins, and not over the surface.

"While it is true that the grant of a right to do a certain thing is to be construed as including all the incidental rights requisite to make a grant effectual, the construction we have placed upon the language of this deed does not limit or curtail any incidental rights requisite to make the grant effectual. It was for the coal and the right to remove it and other coal through the space left when the coal was removed from the land of the plaintiffs, and if the defendant saw fit to sink a shaft for hoisting coal or ventilation on the plaintiffs' land. It is another and different right to be acquired by the defendant, when it brings its coal to the surface, to provide a railroad to get it to market, and if it is found to be necessary, over the land of the plaintiffs; when that right was not given they must acquire it by condemnation under the lateral railroad act or by the purchase of it outright from the owners of the land."

New York & Pittston Coal Co. v. Hillside Coal & Iron Co., 225 Pa. 211, 74 Atl. 26 (1909). Where, under a lease of all the merchantable anthracite coal on the described premises, the owner of the coal uses the gangways on the demised premises in transporting coal from other properties, he is not liable to the lessor for rental for such use of the gangway.

Tennessee.

McBurney v. Glenmary Coal & Coke Co., 118 S. W. 694 (1909). A grantee of minerals underlying a tract of land has no right of way of necessity over the land of a stranger, not the grantor, to remove minerals.

B. Given by Statute.

p. 591. And in addition to cases there cited, see Georgia, Code 1895, §§ 650-657; Iowa, Code 1897, §§ 1967-1974, 2031; Kentucky, Russell St. 1909, § 815; Massachusetts, Rev. St. 1902, c. 195, §§ 17-25, p. 1688; Montana, Laws of 1907, p. 5; North Carolina, Revisal of 1905, §§ 4952-4957; Pennsylvania, Act of July 9, 1897, P. L. 213. Rights of way within and across forest reserves for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels and canals for mining purposes, may be had under act of Congress of Feb. 1, 1905, c. 288, § 4. (See Regulations, 33 L. D. 451.)

United States.

Byrnes v. Douglass, 27 C. C. A. 399, 83 Fed. 45 (1897), 9th Circ., affirming *Douglass v. Byrnes*, 59 Fed. 29. (See Vol. 1, p. 594.) Under the statute there referred to, an old and unused tunnel on one of the claims through which the right of way runs may be condemned and taken.

Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 50 Law. Ed. 581 (1906), affirming 28 Utah, 215, 78 Pac. 296, 107 Am. St. Rep. 711, 1 L. R. A. (N. S.) 976, 3 A. & E. Ann. Cas. 1110. Under the statutes of Utah, "the right of eminent domain may be exercised in behalf of the following public uses: * * * (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines." The state court sustained the condemnation of a right of way for an aerial bucket line to carry ores, etc., from mines to a railroad station. This was held not to be a violation of the Fourteenth Amendment.

"The question thus narrowed is pretty nearly answered by the recent decision in *Clark v. Nash*, 198 U. S. 361, 49 Law. Ed. 1085, 4 A. & E. Ann. Cas. 1171. That case established the constitutionality of the Utah statute, so far as it permitted the condemnation of land for the irrigation of other land belonging to a private person, in pursuance of the declared policy of the State. In discussing what constitutes a public use it recognized the inadequacy of use by the general public as a universal test. While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment which prevents a State from requiring such concessions. If the state constitution restricts the legislature within narrower bounds that is a local affair, and must be left where the state court leaves it in a case like the one at bar.

"In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."

Baillie v. Larson, 138 Fed. 177 (1905). C. C. D. Idaho. Idaho Rev. St. 1887, §§ 3130, 3131, grant tunnel rights through other mining claims upon pursuing proper condemnation proceedings. The act of March 15, 1890, grants to the owner of ground with a tunnel located thereon the right to run the same through other claims upon the payment of actual damages for injury done thereto. The state constitution declares the use of land for the working of mining tunnels to be a public use, and Rev. St. 1887, § 5210, as amended by act of March 3, 1903, defines tunnels and other means of working mines as "public uses". These provisions are proper exercises of the power conferred on local legislatures by U. S. Rev. St. 2338 to provide rules for working mines, involving easements, etc. They do not violate the Fourteenth Amendment to the Federal Constitution.

Alaska.

Miocene Ditch Co. v. Lyng, 2 Alaska, 205 (1904). A corporation organized under the laws of the state of California, coming into Alaska and

complying with the laws of congress relating to foreign corporations doing business in Alaska, has no power of eminent domain to condemn private property for the support and right of way for mining ditches and flumes. The provisions of the code apply to domestic corporations only.

Colorado.

Tanner v. Treasury Tunnel Min. & Reduction Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106 (1906). A mining tunnel to be used for draining mines and for the transportation of waste and ore for such proprietors as desire to avail themselves thereof is a business proposition for the public benefit, and a condemnation for the right of way for such a tunnel, under 3 M. A. S., § 616, authorizing any corporation formed for the purpose of constructing a tunnel to acquire any necessary real estate under the eminent domain act, is a condemnation for a public use.

Kentucky.

Greasy Creek Mineral Co. v. Ely Jellico Coal Co., 116 S. W. 1189 (1909). Kentucky St. 1900, § 815, authorizes any person operating a mine within three miles of a railroad to construct a spur road from the mine to the railroad and to condemn land necessary therefor, and provides that the owner of such road shall be governed by the laws relating to other railroads. Held, this act brings such road within the general laws regulating railroads so that the condemnation of lands therefor is for a public purpose. "These short roads, like trunk lines and other railroads, are subject to the laws affecting common carriers, and they may be required to serve the public as common carriers." The necessity for the land condemned, within the statute, is a convenience substantially advancing the public interest by making the road safer and better.

Pennsylvania.

Palmer's Private Road, 16 Pa. County Ct. Rep. 340 (1895). Under the act of April 13, 1868, P. L. 92, there is no authority to lay a private road partly over and partly under the surface to a fire-clay mine. "The act of April 16, 1838, § 19, P. L. 642, authorizes the laying out of a private road under the surface to a coal mine. The act of April 22, 1857, P. L. 296, extends this act to 'mines of iron ore and other minerals.' Hence, under the act of 1838 and its supplement of 1857, a private road to a fire-clay mine might be laid under the surface. The act of April 13, 1868, P. L. 92, provides that the act of 1838 should apply to a private road wholly over the surface, or partly over and partly under the surface of intervening lands. This act, therefore, would authorize the laying out of a private road partly over and partly under the surface to a coal mine, but does it authorize the laying out of a private road partly over and partly under the surface to a fire-clay mine? We are of the opinion that it does not. The act of 1868 merely extends the act of 1838, but not the act of 1838 as supplemented by the act of 1857. For this reason we must, therefore, hold that there is no jurisdiction in this court to grant the proposed road."

Appeal of Carbon Limestone Co., 188 Pa. 509, 41 Atl. 648 (1898). In proceedings under the lateral railroad law, an appeal from an order directing a bond to be filed before the viewers have reported is premature, and will be quashed.

Under the lateral railroad act of May 5, 1832, P. L. 501, § 3, as amended by the act of April 20, 1850, P. L. 361, § 1, the necessity for the exercise of the right of eminent domain is not determined by the petitioners, but by the viewers with approval of the court, or by the verdict of a jury upon an appeal, and until this preliminary requisite has been established no entry on the land is authorized. The proper practice, therefore, is to defer the filing of the bond until after the court has approved the report of the viewers; or in case of an appeal, until after the verdict of a jury, which under the act of February 17, 1871, P. L. 56, may decide the fundamental question of necessity against the petitioner.

In re Rodgers' Petition, 192 Pa. 97, 43 Atl. 475 (1899). The lateral railroad Act of July 5, 1883, provides that such railroad shall not pass through, disturb the operation, or endanger the safety of any other mine. Where a tract of 450 acres was underlaid with coal and a plan for mining and removing the same had been formulated and followed and a plant had been erected, whose size was in proportion to the area of the coal to be mined, the plant and the entire area of coal underlying the land is a mine within the meaning of the above provisions.

Utah.

Highland Boy Gold Min. Co. v. Strickley, 28 Utah, 215, 78 Pac. 296, 107 Am. St. Rep. 711, 1 L. R. A. (N. S.) 976, 3 A. & E. Ann. Cas. 1110 (1904). Rev. St. Utah 3588 provides that "The right of eminent domain may be exercised in behalf of the following public uses: * * * (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines." This does not conflict with the provision of the Constitution of Utah that "private property shall not be taken or damaged for public use without compensation."

When the taking is for a use that will promote the public interest and which tends to develop the great natural resources of the state, such taking is for a public use. Mining is such a use. It produces a home market for the products of the farm, furnishes thousands with employment and produces wealth which enables other industries to be created and to flourish. It is of vital importance to the people that the mineral resources of the state be developed. The construction and operation of roads and tramways for the development and working of mines is therefore a public use. And this includes a right of way for an aerial tramway or bucket line for the transportation of ore.

III. TIMBER RIGHTS.

p. 598. The rules and regulations prescribed by the secretary of the interior, under act of June 3, 1878 (20 Stat. 88), which were adopted in 1886 (see Vol. 1, page 599), as well as the Regulations of January 18, 1900 (see 29 L. D. 571), have been superseded by the following, adopted March 16, 1909 (see 37 L. D. 492).

“The attention of persons seeking the free use of timber is particularly called to the fact that this act does not authorize the cutting of timber from any lands subject to any form of non-mineral entry. The act applies only to lands subject to mineral entry. Lands subject to mineral entry are such lands as are known to contain such deposits of mineral as warrant a prudent person in expending his time or money in the reasonable expectation of developing a mine thereon. The proper protection of the timber and undergrowth upon lands to be cut over necessarily varies with the nature of topography, soil and forests.

“First. Qualified persons within the states and territories named desiring to take timber for purposes authorized by law must make application for permit to cut timber, such application to be presented or mailed to any register or receiver, or to the chief of field division having jurisdiction over the land.

“Second. Such application shall set forth the names and legal residence of persons applying to fell and remove, and the names and residence of persons who are to use, the timber; also the amount of timber required by each person, and the use to be made thereof, and the date it is desired to begin cutting; also, the lands to be cut over shall be so described in the application that they may be identified from the descriptions set forth. The application must be verified by an applicant. Blank forms for making applications may be procured by addressing the chief of field division.

“Third. Immediately upon receipt of an application, the chief of field division shall cause investigation to be made of the lands, and of material statements in the application. If the chief of field division finds the timber may be cut for the purposes permitted by law, he may authorize cutting to proceed at once under such named restrictions (within the scope of these regulations)

as the protection of the timber and undergrowth may require. Such permit, or a refusal to grant permit, shall be subject to revision by the commissioner of the general land office.

“Fourth. Upon completing investigation of any application, the chief of field division shall make report to the commissioner of the general land office. His report shall contain the application, copy of his permit, or letter declining to grant permit, and shall further show (1) whether the lands are mineral, (2) whether persons named in application are (a) qualified to fell and remove, and (b) authorized to use the timber as stated, (3) what percentage of the matured timber may be taken consistent with proper protection of the remaining timber and undergrowth, with the facts upon which he bases his conclusions; and what method of handling the tops, lops and debris made by logging is necessary for the protection of timber and undergrowth, and the facts upon which his conclusions are based.

“Fifth. Permits granted shall specify (1) the persons authorized to fell and remove, and those authorized to use, with amount and use stated as to each person; (2) identify the lands to be cut over; (3) that only matured timber may be taken, and the percentage of the total stand, acre by acre, to be cut; (4) the method of disposing of the tops and other debris; and (5) that the cutting authorized shall be completed within twelve months of date of permit, or application for renewal must be made.

“Sixth. No timber may be cut in advance of a determined lawful use.

“Seventh. No timber not matured may be cut. Each matured tree taken shall be worked up and utilized for some beneficial domestic purpose. Persons taking timber for specific purposes only will be required to take only such matured trees as will work up to such purpose without unreasonable waste.

“Eighth. Brush, tops, lops and other forest debris made in felling and removing timber shall be disposed of in the manner best adapted to protecting the remaining growth, and as stated in the permit granted.

“Ninth. No timber cut or removed under the provisions of this act may be transported from or used out of the state or territory where cut.

“Tenth. Persons who commence cutting upon permit of chief of field division before final approval by the commissioner will be liable to the government for a reasonable stumpage for timber so taken in event the permit is not finally approved by the commissioner because improperly granted. Where permits are secured by fraud, or immature trees are taken, or timber is not taken or used by persons in accordance with the terms of the law, the government will enforce the same civil and criminal liabilities as in other cases of timber trespass upon public lands.

“Eleventh. Registers or receivers receiving applications under this act will at once forward same to the proper chief of field division, and notify the applicant thereof.

“Twelfth. Registers and receivers are required to ascertain from time to time whether any timber is being cut from mineral lands, except as provided by this act, and notify the commissioner of the general land office, or a special agent of such office, who will make any investigation required. Special agents will also keep informed of all timber cutting within their territory.

“Thirteenth. These rules and regulations shall be in force from and after May 1, 1909, and supercede all prior regulations hereunder.”

Under the acts of Congress of March 3, 1891, Feb. 13, 1893, and March 3, 1901, residents of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, Nevada, Utah, Arizona, New Mexico, California, Oregon and Washington, may procure timber free of charge from unoccupied, unreserved, nonmineral public lands within their respective states or territories, for their own use for certain enumerated purposes among which is mining, but not for sale or disposal nor for use by other persons, nor for export. Each person is limited to \$50 stumpage value in any one year, except upon special permit to be obtained from the secretary of the interior. For the rules and regulations governing this subject, see Circular of February 10, 1900, 29 L. D. 572. See, also, as to Alaska act of May 14, 1898, § 11, Circular of January 13, 1904, 32 L. D. 443; and as to Wyoming act of July 1, 1898, 31 L. D. 412.

The owner of a patented mining claim owns the timber thereon and may cut and dispose of it at will. But the timber on unpatented mining claims is the property of the United States

and the owners of such claims may only take the same when they are within the provisions of the statute and for purposes which the statute permits. They may not, therefore, cut the timber upon such claims for the purpose of exporting the same, or disposing of it outside of the state or territory.

United States.

Teller v. United States, 51 C. C. A. 230, 113 Fed. 273 (1901). 8th Circ. When a person locates and is in possession of a claim, and has made application for patent, but has not yet paid the purchase money, he may not cut timber thereon with intent to export or dispose of it. If he does so, he is guilty of a misdemeanor under Rev. St. 2461 and the acts of June 3, 1878, and August 4, 1892. While for the purpose of subsequent location by private parties the claim was segregated from the public domain and appropriated to private purpose, it was so segregated for that purpose only, and the legal and equitable title to it still remained in the government and it was "lands of the United States" within the meaning of the said acts.

United States v. Copper Queen Min. Co., 185 U. S. 495, 46 Law. Ed. 1008 (1902). It is incumbent upon one claiming timber cut upon public land under the act of June 3, 1878, to show that the person who cut and removed it was both a citizen and a bona fide resident of the state, territory or district.

United States v. United Verde Copper Co., 196 U. S. 207, 49 Law. Ed. 449 (1905). The word "domestic" in the act of June 3, 1878, 20 Stat. 88, c. 150, does not mean "household." It "applies to the locality to which the statute is directed and gives permission to the industries there practiced to use the public timber." The use of timber for roasting ores is permitted by the act.

No. 7 of the regulations adopted by the secretary of the interior, January 18, 1900, 29 L. D. 571, that "No timber is permitted to be used for smelting purposes," is invalid, it being beyond his power to give an authoritative and final construction of the statute. His power is to regulate the exercise of the license, not to take it away.

United States v. Rossi, 66 C. C. A. 442, 133 Fed. 380 (1904), 9th Circ.; *United States v. Edgar*, 140 Fed. 655 (1905). D. C. D. Mont. Rules 5 and 7 adopted by the secretary of the interior, January 18, 1900, abridge the permission given by congress by the Act of June 3, 1878; they are unauthorized and in excess of the authority conferred by the act upon the secretary. When timber has been cut from mineral lands by persons authorized to do so by the act, the fact that the timber is manufactured into lumber and sold as merchandise to be used in the state where it is cut does not render the cutting unlawful; nor does the fact that the timber is cut for firewood and is sold in the state for use in households, mines, smelters and for other local purposes. These are all domestic purposes within the meaning of the statute.

Lewis v. Garlock, 168 Fed. 153 (1909). C. C. D. S. D. The timber on unpatented mining claims is the property of the United States, and the rights of the owners of such claims is inferior to and subject to the ownership of the government. When such claims are within a national forest reserve, timber thereon which is dead and infested with insects so as to be a menace to the growing timber on the reserve may be sold by the government under the forest reserve acts and the regulations of the secretary of agriculture thereunder, and may be removed by the purchaser.

Morgan v. United States, 94 C. C. A. 518, 169 Fed. 242 (1909). 8th Circ. The act of Jan. 3, 1878, authorizes bona fide residents of Colorado to remove for building, agricultural, mining and other domestic purposes, any timber on the public lands, "said lands being mineral, and not subject to entry under existing laws of the United States except for mineral." "The right to cut timber should not be restricted to the particular spot, or minor tract of land, on which mining is being actually done, as there may be an absence of timber thereon sufficient for the miners' use or other domestic purpose. It follows, as a logical sequence, that the citizen may enter upon and take timber from adjacent lands, they being mineral, although no mining development work has been done thereon. In such conjuncture, the question arises, how, in the absence of such actual discovery and development, it is to be determined whether or not it be mineral land? The courts apply to the situation the rule of *noscitur a sociis*, as one of practical sense and necessity. If contiguous or near thereto, in the sense of neighborhood—'vicinity, adjoining district'—there be lands on which mineral has been actually discovered by development work, and the land in question be of like topography, or delineation, with the same surface indication of what is known as a lead or float in a placer mining region, it would warrant the inference that such tract is also mineral land within the meaning and intent of the statute. From the premises it follows that it is not essential that on the particular piece of land from which the defendant removed timber any mine should have been opened, disclosing mineral in paying quality or quantity. It was sufficient, if by reason of the presence of valuable mineral in the neighboring lands of like surface characteristics, a reasonable, prudent person likely would have been lead to expect to find mineral in the adjacent tract."

In an action by the government for cutting and removing timber from the public lands,, it is error to charge the jury that to justify the taking of timber therefrom the land must present such indications as would justify a reasonable and prudent person experienced in such matters in spending his money in working for mineral development in the honest belief that he could do so at a profit.

In such an action, where the defendant went upon the land and took the timber in good faith, believing that he had a right thereto, the measure of damages is the stumpage value of the timber, not its manufactured value.

Lynch v. United States, 71 C. C. A. 59, 138 Fed. 535 (1905). 9th Circ. The question whether land is mineral under the act of June 3, 1878, c.

150, 20 Stat. 88, is always one of fact. Evidence of actual use is admissible. The character of the land is not a subject for expert opinion. The jury are competent to draw an inference from the facts shown. Nor is the government bound by the classification made by the mineral land commission under the act of February 26, 1895. That classification does not prevent the land department from making such disposition of the land as would be proper upon a subsequent showing that the land was not in fact mineral.

United States v. Plowman, 216 U. S. 372, 54 Law. Ed.—(1910). The act of June 3, 1878, c. 150, authorizes the cutting of timber "on the public lands, such lands being mineral and not subject to entry under existing laws of the United States, except for mineral entry." Mineral lands within the meaning of this statute are only those which are valuable for minerals, and, in determining the character of the land, the same tests are applicable as in determining what land is subject to mineral location. The act does not authorize the cutting of timber on lands which are adjacent to lands valuable for minerals, but which do not themselves contain valuable deposits of minerals.

Arizona.

United States v. Copper Queen Consolidated Min. Co., 7 Ariz. 80, 60 Pac. 885 (1900). Under the act of June 3, 1878, permitting residents of mineral districts in the United States to fell and remove, for mining and other purposes, timber growing on mineral lands, it is necessary, in order to constitute the lands "mineral lands," that they should contain minerals in quantities sufficient to render them available and valuable for mining purposes.

Although, under the statute, the secretary of the interior may prescribe rules and regulations for the protection of the timber growing upon the lands, he may not prescribe from what lands timber may be cut, nor in any way enlarge or detract from the privileges granted in the act.

New Mexico.

United States v. Routledge, 8 N. M. 385, 45 Pac. 883 (1896). On an indictment for the unlawful cutting of timber on public land, if the defendant shows that he had a mineral entry upon the land in question and consequently had a right to cut timber for mining purposes, the burden is on the government to prove that he cut the timber for unlawful purposes.

LAND OFFICE DECISIONS.

The secretary of the interior will not approve a contract between the Indian office and the owners of mining claims on an Indian reservation open to entry under the United States mining laws, allowing the mine owners to cut timber thereon for the purpose of developing the property, because the owners of bona fide mining claims may do this without any

contracts and those who are not the owners of bona fide mining claims could not even if they did obtain such contracts. *Opinion*, 30 L. D. 88 (1900).

Not only is authority and permission to fell and remove timber and trees, under the act of June 3, 1878, extended to cover only the public mineral lands susceptible of mineral entry alone, but the act does not as to such lands secure to miners of the vicinity an exclusive right of timber appropriation. If any given tract is in effect mineral in character, title thereto, together with the timber thereon, may be acquired under the mining laws; and on the other hand, if the tract is vacant and nonmineral, valuable chiefly for timber but unfit for cultivation, it may be purchased under the timber and stone act. To such land the timber cutting act is not applicable. *Gallagher v. Gray*, 35 L. D. 90 (1906).

The land department yields to the decision of the federal court and no longer insists that "all other mineral districts of the United States" include California, Oregon and Washington. *Instructions*, 38 L. D. 75 (1909).

An Arizona corporation, which has complied with the requirements of the law of Idaho to permit it to do business in that state, and which does business in that state only, is not a resident thereof within the meaning of the act of June 3, 1878. *Centerville Min. & Mill. Co.*, 39 L. D. 80 (1910).

IV. TAILINGS AND REFUSE.

A. *Property Therein and Their Deposit on the Land.*

p. 607.

United States.

McCann v. Wallace, 117 Fed. 936 (1902). C. C. D. Or. Where the evidence shows that a ditch running through complainant's land is of sufficient capacity, if kept in good repair, to carry off all of the water from defendant's mine, the court will not enjoin the operation of defendant's mine because the complainant refuses to let defendant go upon complainant's land to repair the ditch, and the nonrepair of the ditch allows the water to overflow defendant's land.

Ritter v. Lynch, 123 Fed. 930 (1903). C. C. D. Nev. Lynch, the owner of a mill site upon which he operated a mill for crushing and reducing ore, constructed a reservoir on adjoining unoccupied public land, in which he impounded the tailings from his mill for the purpose of preserving them from waste or destruction until such time as they could be profitably worked or sold. After his death his widow continued to pay taxes on the land and have it looked after by resident agents, who kept trespassers off and from time to time had work done to protect the tailings against being washed away. These acts were held to be sufficient to preserve the ownership of the tailings, and to maintain a possession of the land on which they were deposited, which precluded the entry of another for the purpose

of locating thereon a placer mining claim, based principally on the discovery of mineral in the tailings.

"It must be admitted that, if the tailings had been suffered by Mr. Lynch to flow where they listed, his claim of ownership therein would have to be considered as abandoned; or if the tailings were, by their own uninterrupted flow, lodged upon the land of another, they would be considered as an accretion, and belong to the owner of the land. If they were allowed to flow in their natural course, and accumulate on vacant and unappropriated public land, they would become subject to appropriation by any one who took them up and pursued the steps and proceedings analogous to the location of placer mining claims."

The court, after quoting *Rogers v. Cooney*, 7 Nev. 213 (see Vol. 1. pp. 330 and 611), continued: "Mr. Lynch might, under the principles announced in that decision, have taken up the land on which the tailings were deposited as a placer mining claim—because the tailings deposited thereon gave it value as mineral land—by taking all the steps required by the mining laws, rules, and regulations. This might have been a safer course for him to have pursued in order to prevent litigation and save expense and trouble. But was it absolutely necessary to do so in order to obtain the right of possession to such land? The land was situated in a ravine below the quartz ledges on the Comstock lode, unfit for cultivation, upon and over which could be found only small quantities of gold or silver, which came chiefly from the ledges or mills above. Did not the acts of Lynch in conducting the tailings from the mill and running them upon this land and building a reservoir to keep them confined clearly manifest his intention to claim and hold possession of the land for the purpose stated, and were they not of themselves sufficient to impart notice that the land was claimed and occupied for that purpose? What other physical marks were necessary to designate the ground or give notice to the world of the extent of Lynch's claim, and the purpose of his occupancy and possession thereof? This case may be *sui generis*, in that it is apparently the only case that has come before the courts without some proof that other steps were taken to more particularly define the boundaries and extent of the claim. Further steps would, of course, be necessary if the defendants claimed more ground than the reservoir and tailings covered, and their claim must be limited to the land covered by the tailings and the reservoir, with sufficient ground around the same reasonably necessary to protect the claim, or to work upon or remove the tailings therefrom. It does not follow that, because the land could have been located by Lynch as mineral land, he could not obtain a right of possession thereto for the purpose of saving the tailings without complying with all the steps required by the mining laws. The question of what acts are necessary to obtain possession of land always depends upon the facts of each particular case. They must always be of such a character as to show the dominion and control of the claimant over the land."

California.

Jacob v. Day, 111 Cal. 571, 44 Pac. 243 (1896). A tailrace, sluice-way, ditch or cut by which water bearing detritus from a hydraulic mine is carried, is within the protection of Rev. St. 2339.

This is not the drainage of the mine, which would be covered by Rev. St. 2338. The use of water is an essential of hydraulic mining, its final use being to remove the waste matter so as not to impede further operations. "The water itself does not lose its utility to the miner nor become an impediment to his work during any of these processes. Through them all it is not only of high utility, but an absolute necessity. It is, therefore, inaccurate to call it waste or superfluous water, or to describe the work which it does in carrying tailings as the drainage of a mine. To drain land is to rid it of its superfluous moisture. In the case of a quartz or drift mine, drainage is an appropriate term when applied to the means by which water, which is in them, always superfluous and a hindrance to the work, is met and disposed of. But hydraulic mining is defined to be 'mining by means of the application of water under pressure through a nozzle against a natural bank' (Civ. Code, sec. 1425)."

This is "the use of water for mining purposes" within the statute. "The use of water for the purpose of carrying off the tailings, and the construction of the ditch to aid therein, are as essential to the successful conduct of hydraulic mining as is the first use to which the water is put in washing down the natural bank."

Sutter County v. Nicols, 152 Cal. 688, 93 Pac. 872, 14 A. & E. Ann. Cas. 900 (1908). "The business of mining for the benefit of the mine owner is as much a private affair as that of the farm or factory, and the right of eminent domain cannot be invoked in aid of it. * * * The production of sufficient gold to maintain the gold standard may be a matter of public importance and it may be within the power of Congress to encourage it by appropriate legislation. It probably has the same power with regard to any other industry tending to increase the wealth of the nation. It cannot be admitted, however, that the mining of gold to be applied wholly to the private use of the miner, to whatever extent it may increase the general output, is a public purpose, in behalf of which the power of eminent domain may be resorted to, or for which the private property of others may be taken, or its injury lawfully authorized."

The act of Congress of March 1, 1893, establishing the California Debris Commission, gave that body the right to grant permits to operate mines by hydraulic process, to prescribe the methods by which such mines might be operated and how the debris might be disposed of. And though the operator work his mine in strict accordance with the requirements of the commission, nevertheless, if the means suggested and acted upon are insufficient to prevent the discharge of debris, etc., the operator is liable for such damage, since the act of congress does not effect the jurisdiction of state courts to enjoin nuisances caused by persons engaged in private industries.

Louisiana.

McFarlain v. Jennings-Heywood Oil Syndicate, 118 La. 537, 43 So. 153 (1907). Article 860 of the Civil Code reads: "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude. The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome." Under this article the proprietor of the estate above has no legal right to discharge into a natural drain the waste oil and salt water proceeding from wells sunk on his premises, and is responsible for the resulting damages to the estate below.

Missouri.

Jack Harrard Zinc & Min. Co. v. Continental Zinc & Lead Min. & Smelting Co., 106 Mo. App. 66, 80 S. W. 12 (1904). A licensee engaged in mining may enjoin an adjoining mine operator from discharging water and debris across the plaintiff's lot, and from removing rock which the plaintiff had put up as an obstruction to prevent the flow of such water across his lot.

New York.

White v. Lansing, 119 App. Div. 584, 103 N. Y. Supp. 1040 (1907). Where, in the development of a plaster quarry, it is not necessary to dump the waste on the property of another, the court will, on such ground alone, enjoin the same.

Oregon.

Miser v. O'Shea, 37 Or. 231, 62 Pac. 491, 82 Am. St. Rep. 751 (1900). One cannot justify the discharge of debris from his mine into the mine of another on the ground of adverse user, where he fails to show such an adverse user to have existed for ten years subsequent to the acquisition of the latter's title from the United States. There can be no use of premises adverse to the United States. A license to deposit debris from the licensee's mine upon the licensor's mine is revocable, unless the licensee, relying upon the faith of the license, makes permanent valuable improvements upon the estate which may inure to the advantage of the owner thereof.

Pennsylvania.

Potter v. Rend, 201 Pa. 318, 50 Atl. 821 (1902). See this case on page 595.

B. *Pollution of Streams.*

p. 613. The doctrine of *Pennsylvania Coal Co. v. Sanderson* has been expressly repudiated in New Jersey and Tennessee. There now, as in most of the states, the obligation of an upper riparian owner is not modified because he has a mine on his property. He not only must not deposit the refuse of his mine in the stream, but also must not befoul it by discharging therein polluted water which would not have found its way into the stream by the force of gravitation alone, unaided by artificial means. (This view is also taken in England. *Young v. Bankier Distillery Co.*, 1893 App. Cas. 691.)

United States.

North Bloomfield Gravel Min. Co. v. United States, 32 C. C. A. 84, 88 Fed. 664 (1898), 9th Circ., affirming *United States v. North Bloomfield Gravel Min. Co.*, 81 Fed. 243 (1897). C. C. N. D. Cal. The act of Congress of March 1, 1893, "to create the California Debris Commission and regulate hydraulic mining in the State of California," is not merely permissive and directory, but mandatory and is a proper exercise of the power to regulate commerce. The effect of this act is to render it unlawful in the territory named (that drained by the San Joaquin and Sacramento river system) until the commission could find that such mining could be carried on without obstructing the navigability of the rivers. The mining company was enjoined from using the hydraulic method until it complied with the requirements of the act of Congress, although its answer denied any deposit of refuse in the rivers. "The argument of the appellant that, the act left hydraulic mining without injury to navigable streams exactly where it stood before the passage of the act" cannot be sustained. The question is not left to the courts to determine whether the acts committed by any individual mine owner, in any particular manner, are injurious or not. The fact is that the question as to whether the acts committed by appellant are injurious to the free navigation of the river is settled by the terms of the act itself, which, in all its provisions, proceeds upon the ground that injury must necessarily result from hydraulic mining unless conducted and carried on in the manner permitted by the act. Under the law mine owners engaged in hydraulic mining have no right to use the streams without the permission of the commissioners appointed under the provisions of the act. In other words, the act of congress of itself prohibits all hydraulic mining unless its terms are first complied with."

City of Oroville v. Indiana Gold-Dredging Co., 165 Fed. 550 (1908). C. C. N. D. Cal. One who owns the bed of a river, and engages in extracting gold from the gravel thereof by means of a dredge, owes to a city on the bank of the river the duty not only of making provision for the ordinary

flow of water, but of exercising the highest circumspection to avoid obstructions which will injuriously affect the city in periods of unusually high water. "While the defendant is not bound to provide against extraordinary floods, which competent and skilled persons familiar with the history of the river and with its water-shed cannot reasonably anticipate, it cannot ignore freshets which are known to occur, although rarely and at irregular intervals." An injunction was accordingly granted which, while it permitted the defendant to leave the ridge of sand, gravel and stone made by the dredge parallel to the course of the stream, required it to make an opening in the ridge which was made transversely.

Alabama.

Alabama Consolidated Coal & Iron Co. v. Vines, 151 Ala. 398, 44 So. 377 (1907). Companies engaged in mining upon the banks of streams have the right to use the streams for the purposes of mining, but they may not deposit therein anything that will be carried down stream, and which will materially pollute the stream or deteriorate the quality of the water where it passes along the land of other riparian owners, and they may not deposit in such streams any substance that will be carried down and deposited upon the lands of others and injure or deteriorate those lands.

California.

Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049 (1903). The discharge of debris from a mine into a creek, whence it is carried down to a river and thereby lodged upon the property of a riparian owner, and raises the bed and channel of the river, and causes the lands on each side thereof, in times of flood, in the absence of high and secure levees, to be covered with water and debris, to the great damage of such lands, constitutes a public nuisance, and, being especially injurious to said riparian owner, may be enjoined at his suit, since to him it is also a private nuisance.

Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 Pac. 292 (1908). "It is thoroughly established that no matter how carefully the miner may conduct his operations, he has no lawful right to flood or wash away his neighbor's land, or deposit mining debris thereon to its injury, and that if by the deposit of mining debris in the stream he causes such a result, he is liable for the resulting damage. The fact that he uses all the care for the protection of his neighbor's property consistent with the successful conduct of his mining operations is immaterial."

Colorado.

Suffolk Gold Min. & Mill. Co. v. San Miguel Consol. Min. & Mill. Co., 3 Colo. App. 407, 48 Pac. 828 (1897). In this case the court lays down as a general rule that a mine owner may not, in working his mine, pollute a stream so as to damage a lower riparian owner, and then

takes up the specific question presented by the facts of the case whether prior appropriators of a part of the waters of a stream acquire a title subject to similar conditions with reference to subsequent locators. "The Suffolk Company acquired title so far as regards a detrimental user to less than one-thirtieth of the water of the stream. The balance of it was open to subsequent locators who were, equally with the first comer, entitled to divert and apply it. Under these circumstances we are quite of the opinion that the title and rights of the prior appropriating company were not absolute, but conditional, and they were obligated to so use the water that subsequent locators might, like lower riparian owners, receive the balance of the stream unpolluted, and fit for the uses to which they might desire to put it. This, of course, is subject to the condition that the circumstances and situation of the use and the application were such as to permit the preservation of the remaining volume of the stream in its original condition. We do not undertake to decide that, if the prior appropriator had put the property to a use under circumstances which rendered it impossible for him to enjoy it without some detriment to the unappropriated water he might not have the right to thus use it."

Idaho.

Hill v. Standard Min. Co., 12 Idaho, 223, 85 Pac. 907 (1906). Section 3, art. 15, of the Idaho Constitution, provides that, in any organized mining district, those using the water for mining purposes or milling purposes connected with mining shall have preference over those using the same for manufacturing or agricultural purposes. This refers to the use of the water, not how it shall be used. There is a wide difference between the natural pollution or poisoning of waters which may necessarily and unavoidably result from the employment of the usual processes of reducing ores, and the dumping of earth, rock and debris into the channel of a stream and filling up and thereby causing it to overflow and flood the lands of others. In an agricultural section a miner would not be permitted to use the waters of an irrigation stream in milling and concentrating ores if the result would be to poison or pollute the water so as to injure growing crops or irrigated lands below.

Indiana.

Ohio Oil Co. v. Westfall, 43 Ind. App. 661, 88 N. E. 354 (1909). In a suit for damages alleging that defendant maintained oil wells upon its premises which were offensive to the senses and injurious to the health of plaintiff, and injurious to the vegetation growing on her land, and which corrupted the water of a natural stream flowing from defendant's lands through plaintiff's lands, rendering it unfit for use for the purpose of watering stock, and destroying a well of water used for domestic purposes, it is a sufficient answer that the things complained of were rendered necessary to the enjoyment of his own property by defendant, and that, in the maintenance of the offensive oil well, he was not actuated by

malice and that he used due care to avoid injury to plaintiff. Whether or not the manner in which defendant's premises were used was a reasonable use of them is a question for the jury.

Montana.

Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622 (1897). The owner and operator of placer ground who deposits large quantities of tailings and debris in a stream, making it unfit for agricultural or other useful purposes and filling up and diverting it, is liable for damages to a lower riparian owner without regard to whether he was negligent or not. It is immaterial whether or not he could have so operated his mines as to have prevented the damage to plaintiff's land. "We believe that the right to deposit tailings in a running stream to a reasonable extent is permissible in the mining states and territories, but this rule has never been carried to the extent of permitting the miner to flood his neighbor's land, and by depositing tailings and debris thereon, to substantially injure or ruin his neighbor's property."

New Jersey.

Beach v. Sterling Iron & Zinc Co., 54 N. J. Eq. 65, 33 Atl. 286 (1895), affirmed *Sterling Iron & Zinc Co. v. Sparks Mfg. Co.*, 55 N. J. Eq. 824, 41 Atl. 1117 (1896). The doctrine of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445 (see vol. 1, page 625), is not followed in New Jersey; it never had the least foothold in this state. "No case of a stream fouled by mining operations has, indeed, ever, so far as I know, been presented to our courts, but the right of a riparian proprietor to have the waters of the stream come to him unchanged in quality, as well as undiminished in quantity, has been determined in the clearest and most positive manner." Mining is not a natural use of the land in the sense that farming is.

It is no defense to a bill for an injunction, brought by a riparian owner to restrain a mine owner from polluting the stream, that the pollution is unavoidably caused by mining operations carried on by the defendant without negligence. It is also immaterial that the stream was always more or less polluted from other causes, if the defendant's operations sensibly increase the pollution.

Injunction is the proper remedy, the injury being a continuing nuisance.

Sterling Iron & Zinc Co. v. Sparks Mfg. Co., 38 Atl. 426 (1897). A non-riparian mine owner may not artificially cause the injurious discoloration of a natural watercourse by water from his mine if, by the use of practicable means within his knowledge, he may carry on his operations without injury to the rights of others.

Ohio.

Wheeler v. Fisher Oil Co., 6 Ohio N. P. 309 (1899). If salt water from an oil well flows into a water well belonging to the plaintiff and renders

the water therein unfit for domestic purposes, the operator of the oil well is liable for damages for the injury thus sustained, unless the injury was one which could not have been prevented with reasonable care and expense on the part of the defendant, and unless the plaintiff himself contributed to such injury. "Prima facie the defendant had the right to conduct the salt water, necessarily pumped from the wells in the successful operation thereof, into and away by the natural drains—in this case into and away by said run; but if by so doing the quality of the water in said run was so affected as to render it unfit for domestic purposes by plaintiff and other lower riparian owners, and such injury was plainly to be anticipated by the defendant, and was preventable by the exercise of reasonable care at a reasonable cost, it was incumbent upon the defendant to use such care, and if it failed to do so, when by the use of such care the fouling of the water in the run could have been avoided, it would be liable. * * *

By reasonable expense is meant such an expenditure as the production of said wells would reasonably have justified."

Straight v. Horer, 79 Ohio St. 203, 87 N. E. 174 (1909). This was an action by a lower riparian owner for damages for the pollution of a stream by an upper riparian owner, resulting from the operation of his land for petroleum. Among other defenses it was set up by defendant that he cast no water or other substance upon the plaintiff's land, except by the stream which naturally flowed from his land to hers; that he was engaged in operating his land carefully, and in the only known mode for operating lands for underlying petroleum; and that the resulting discharge of salt water raised from his wells into the stream, which was the natural drainage of the basin, was inevitable. A demurrer to this defense was sustained. The court refused to follow *Pennsylvania Coal Co. v. Sanderson*. "It is the right of the lower proprietor of lands upon a running stream to receive the water from the upper proprietor free from contamination by artificial means, and for substantial injuries which result from an invasion of that right he may maintain action without regard to the motive which prompts the invasion."

In cases of this character, an injunction will not be allowed where the invasion does not amount to an appropriation of property, but merely constitutes a nuisance. *Salem Iron Co. v. Hyland*, 74 Ohio St. 160, 77 N. E. 751 (1909).

Oregon.

Carson v. Hayes, 39 Or. 97, 65 Pac. 814 (1901). An upper and subsequent appropriator of water for mining purposes will be enjoined from (1) impounding the water, and sending it down at irregular times and intervals, at an increased or retarded flow, to a prior appropriator, who is using it for mining purposes, so as to damage or impair its use to the latter; and (2) from dumping his mining debris into the channel of the water, and allowing it to be carried by the water down to the land of the lower proprietor, to his injury. The fact that the upper owner worked cautiously and carefully, and in the only feasible way, is no defense, nor

can he claim a prescriptive right to use the stream for the deposit of his debris and tailings where the use made of the stream during the time that it was acquiesced in is not shown to have invaded the rights of lower owners. The fact that lower owners watched without objection the construction of works which caused the results complained of does not estop them to ask that the operation of the works be restrained; they were entitled to assume that they would be operated so as not to interfere with their rights.

York v. Davidson, 39 Or. 81, 65 Pac. 819 (1901). Where the system employed by an upper riparian owner to impound the tailings and debris from his mine is not effective, and the dams which he has constructed for this purpose are unsafe and insecure, especially in times of freshets, and are liable to give way and precipitate their contents on the land of a lower riparian owner, the court will enjoin the upper owner from discharging any waste into the stream or impounding the same at any point above the lower owner's premises until the upper owner shall have adopted and constructed an efficient and durable system and device for the purpose, such as will meet with the approval of persons skilled in such matters and of the court.

Pennsylvania.

Keppel v. Lehigh Coal & Nav. Co., 200 Pa. 649, 50 Atl. 302 (1901). Where a coal mining company so conducts its operations as to cause a continuous discharge of culm into a stream, and the culm is carried down the stream and continuously accumulates in a dam and race of a mill, equipped for both steam and water power, the owners of the mill are entitled to an injunction to restrain the continuance of the nuisance, and also to damages for the injuries sustained to the time of suit.

In such a case the owners of the mill are entitled to recover as damages (1) the increased cost of running the mill by steam, in so far as it was made necessary by the diminished water power, occasioned by the introduction of culm and dirt by the defendant; and (2) the cost of cleaning out the culm and dirt from the dams and mill race. They are not entitled, however, to recover the cost of a new arrangement of gateways and sluices intended to keep the mill and the race clear in the future. The injunction will protect them from future interference.

Stevenson v. Ebervale Coal Co., 201 Pa. 112, 50 Atl. 818, 88 Am. St. Rep. 805 (1902). In trespass for damages for pollution of stream by coal dirt, the measure of damages is the cost of removing the coal dirt, unless the expense of the removal exceeds the value of the entire property, in which case that value is the limit of the damages. In no event can there be a recovery in excess of that amount. (Followed in *Stevenson v. Ebervale Coal Co.*, 203 Pa. 316, 52 Atl. 201 [1902]; and in *Bachert v. Lehigh Coal & Nav. Co.*, 208 Pa. 362, 57 Atl. 765 [1904].)

Bachert v. Lehigh Coal & Nav. Co., 208 Pa. 362, 57 Atl. 765 (1904). A mining company which leases collieries to others, reserving authority to

direct the lessees in regard to disposing of refuse, is not liable for the pollution of a stream caused by the lessee without the company's knowledge and consent.

Roaring Creek Water Co. v. Anthracite Coal Co., 212 Pa. 115, 61 Atl. 811 (1905). A preliminary injunction will be granted against a coal company where on the hearing it is developed that the defendant was pumping impure water which had accumulated in a coal mine into a stream, where it polluted the supply of drinking water for more than 30,000 people, when by the construction of a flume at trifling expense the mine water could be discharged into another watercourse where it would injure no one.

Bricker v. Conemaugh Stone Co., 32 Pa. Super. Ct. 283 (1907). An action by the owner of a mill dam for damages caused by the refuse from a quarry which found its way into the stream is governed by *Hindson v. Markle* (see Vol. 1, p. 629), and is not within the rule in *Pennsylvania Coal Co. v. Sanderson* (see Vol. 1, p. 625).

The damages are twofold: First, the cost of removing the deposits occasioned by the acts of the defendant from the dam and race of the plaintiffs; and, second, the compensation for the total or partial loss of the use and enjoyment of the premises in the meantime, or in other words, the difference in rental value of the property as affected by the injury complained of.

Pierce v. Lehigh Valley Coal Co., 40 Pa. Super. Ct. 566 (1909). "It is a well established rule of law regulating mining operations that the proprietor has no right to discharge culm and other refuse of the mine into a stream, or to leave it where it will be carried by ordinary floods onto land of other persons. If he does so dispose of it he renders himself liable for any damage resulting therefrom to such owner. Where the material is unlawfully put into the stream, the fact that an extraordinary flood was a contributing cause in carrying it onto the plaintiff's land does not relieve the person whose wrongful act placed the injurious material in the channel." Defendant discharged culm into a stream, whence it was carried by an extraordinary flood and deposited upon the land of the plaintiff. The owners of other coal mines along the stream likewise discharged culm and refuse therein, and it was claimed that plaintiff's injury was chargeable in part at least to this cause. The defendant is not responsible for injury caused by the acts of others and it was the duty of the plaintiff to introduce evidence to show to what extent the injury complained of was the consequence of the defendant's action. He is not, however, required to do this with mathematical exactness. Evidence which reasonably tends to support his allegation is sufficient. The facts must be ascertained according to the best evidence the nature of the case affords, and it is for the jury to determine from the evidence whether and to what extent the culm deposited by the defendant in the river damaged the plaintiff's land.

Tennessee.

Bowling Coal Co. v. Ruffner, 117 Tenn. 180, 100 S. W. 116, 9 L. R. A. (N. S.) 923, 10 A. & E. Ann. Cas. 581 (1906). A mine operator pumped from his mine water which was acidulated by natural processes, not through the impregnation thereof with any foreign material by the operator. This water was conducted into a pipe which emptied into a drain, from which it flowed naturally into a stream which passed through the farming land below and rendered the water of the stream unfit for domestic and other purposes on the farm, for which it had formerly been customarily used. The mine operator was held to be liable in damages, although such disposition of the water was essential to the use and operation of his mine.

The court rejected the principle of *Pennsylvania Coal Co. v. Sanderson*, and adopted the principle that any riparian owner who diverted the whole or any part of the water of a stream from its natural course, or interfered with its natural current, or rendered its water unwholesome, offensive or unfit for the purpose for which it had been used, is responsible absolutely, and his liability is not affected by any question of negligence or malice.

Virginia.

Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co., 110 Va. 444, 66 S. E. 73 (1909). When several persons operate separate coal mines, and, acting independently and not in concert, deposit refuse matter in a stream, by which it is carried down and deposited on land of another riparian owner to his injury, one of such persons is not liable for the whole damage done. He is only liable for the damage resulting from his own act, notwithstanding the difficulty of measuring the damages caused by the wrongful act of each contributor to the aggregate result.

West Virginia.

Day v. Louisville Coal & Coke Co., 60 W. Va. 27, 53 S. E. 776, 10 L. R. A. (N. S.) 167 (1906). A company mining coal and making coke cast slag and other refuse materials into or near a stream, which carried them down and deposited them on the land of a riparian owner, damaging said land. This was held to be an act for which the landowner could recover damages. West Virginia does not regard the hurtful consequences to the coal and coke interests in affirming the doctrine of *sic utere tuo ut alienum non laedas*.

V. DRAINAGE.

CHAPTER XX.

WATER RIGHTS.

p. 637. The authors find that the further consideration of water rights will lead far beyond the limits of the subject to which this book is devoted. The use for mining purposes is but a fraction of the beneficial uses to which the rivers of the west are now devoted, and the cases inevitably involve questions of irrigation, manufacturing, public and domestic uses, which are without particular application to the industry of mining. It has therefore been thought best to omit this subject from the present volume.

CHAPTER XXI.

RIGHTS OF SURFACE AND LATERAL SUPPORT.

I. Surface Support.

II. Lateral Support.

I. SURFACE SUPPORT.

p. 675. The leading case of *Bonomi v. Backhouse* (E. B. & E. 622; 9 H. L. Cas. 503) established that the right of surface support was not a right in the minerals, was not an easement in the subjacent estate, but was an ordinary property right, which is incident to the ownership of all land, that an adjoining owner (who in this instance is the mine owner) must so use his property as not to injure his neighbor. "The right which a man has is to enjoy his own land in the state and condition in which nature has placed it, and also to use it in such manner as he thinks fit, subject always to this; that if his mode of using it does damage to his neighbor, he must make compensation." It followed that no injury was done to the surface owner by the excavation of the minerals until actual damage was done to the surface. This case has been generally accepted in America. (13 Harvard L. R. 665; 15 Id. 574.)

The supreme court of Pennsylvania has rejected the decision of the English case and holds that the right of surface support is violated when the support is withdrawn, and at that time the cause of action of the surface owner accrues without regard to when actual damage occurs. From that time, therefore, the statute of limitations runs against the surface owner, although the period of the statute may have expired before the surface subsides or cracks. Whether "the conditions of coal mining in this country" which influenced the Pennsylvania court in reaching this decision will have a similar effect on the courts of the other mining states remains to be seen, although Alabama has refused to follow the Pennsylvania precedent.

In the meantime the supreme court of West Virginia has taken the position that where an owner of land conveys the coal beneath

it, he has no right of surface support unless it be reserved expressly or by implication in the deed. The actual decision might have been reached without taking this extreme position, but the majority of the court seemed disposed to repudiate the accepted rules as to surface support.

The growth of the rule in the other direction is illustrated in Georgia, where it has been held that where the nature of the mineral is such that it cannot be excavated without disturbing the overlying soil, the mine owner will not be permitted to mine at all, until his minerals are uncovered by some means other than his own act.

The measure of damages for injury caused by failure to provide surface support when the injury is permanent is the depreciation in the value of the land caused by the subsidence. If the injury is reparable, the cost of repairing the damage is the proper measure, provided that it is not greater than the diminution in the market value. If it is, then the latter is the true measure of damage.

In addition to the remedy by action for damages, the surface owner may have his remedy in equity by injunction against the mine owner who fails to leave sufficient support, when the injury done or threatened is irreparable, that is, cannot be adequately compensated by damages in an action at law, or where permanent improvements or buildings are endangered.

In those states in which by statute the owner of the minerals may be required to give security for the protection of the surface, it is also provided by the statutes that mining may be enjoined upon the application of the surface owner, until such security is entered. (Idaho Civ. Code, § 2571; North Dakota Pol. Code § 1810; South Dakota Pol. Code, § 2542. See, also, vol. I, page 678, n. 1.)

United States.

Kuhn v. Fairmont Coal Co., 215 U. S. 349, 54 Law. Ed.—(1910), reversing 152 Fed. 1013. The decision in *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115, below, is not binding as a rule of property upon a federal court in a case which is brought to recover damages for failure to support the surface, where the language of the deed is identical with that in the former case, that case having been decided after the contract in the present case was executed, after the injury com-

plaint of was sustained, and after the action was instituted. Holmes, White and McKenna, dissenting.

Alabama.

Gloss-Sheffield Steel & Iron Co. v. House, 157 Ala. 663, 47 So. 572 (1908). The failure of a mine operator to sufficiently timber his mine to prevent injury to his superjacent neighbor is negligence, and where in consequence of such negligence the neighbor's well of water dried up and cracks and fissures appeared in his land, he has a right to recover for all damages proximately resulting therefrom.

Gloss-Sheffield Steel & Iron Co. v. Sampson, 158 Ala. 590, 48 So. 493 (1909). In the absence of any stipulation to the contrary, the owner of the minerals below the surface holds them subject to the obligation that he shall so mine them as not to injure the surface. This means the surface only, and does not apply to wells and springs which are fed by subterranean streams. The dissenting opinion in *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115, is approved.

"While there is a difference as to the commencement of the running of the statute of limitations between cases where the act complained of was unlawful in itself and those where the act was lawful and the damage claimed is consequential, yet where the injury is continuing or recurring, the rule in each case is that damages can be recovered only for the injury occurring within the period of limitations," which in Alabama is one year.

In an action for damages for failure to furnish surface support, the complaint must state the time of the occurrence of the injury, and also whether the defendant was a trespasser, or acted under any right in making the excavation.

West Pratt Coal Co. v. Dorman, 49 So. 849 (1909). The right to mine is servient to the right of the owner of the surface to have it perpetually sustained in its natural state by adequate supports, and damages for failure to provide such supports are recoverable without reference to the negligence of the mine owner in working the mine.

The evidence tended to show that coal had been mined under the premises in question by a former owner, and both before and after the point of time, one year before suit was brought, defendant had also mined. The settling of plaintiff's lot occurred less than a year before suit was brought. The court refused to follow *Noonan v. Pardee*, 200 Pa. 474, 50 Atl. 255, but approved the decision of the House of Lords in *Bonomi v. Backhouse*, and relying on that case and the Alabama cases in regard to nuisances, held that "the statute of limitations will not begin to run in an action of the sort here involved until some actual mischief has been done to the upper soil." "A cause of action accrues to the owner of the upper soil when the failure to support by the underlying strata, through causes put into operation by mining them, interferes with the utility and enjoyment of the superincumbent soil."

The nuisance cases "went upon the theory that the injuries complained of had causal origin in the maintenance of a nuisance, and it was considered by them that the injurious consequence resulting from the nuisance rather than the act which produced the nuisance was the cause of action."

Colorado.

Campbell v. Louisville Coal Min. Co., 39 Colo. 379, 89 Pac. 767, 10 L. R. A. (N. S.) 822 (1907). Where the owner of underlying coal leased the same, and the lessee agreed to operate so as to protect the mine as far as possible, and yet conducted his operations so as to leave no pillars, in consequence of which the surface fell in, the lessor was liable in damages to the owner of the surface. While the lease contained no express provision requiring the lessee to leave supports, the law requires him to do it, and the lessor, the owner of the underlying estate, is bound to see that this obligation is carried out. This case does not fall within the rule that a lessor is not liable for the negligence of his lessee. The liability does not depend on negligence.

Gen. St. Colo., §§ 3139, 3159, 3620, give the surface owner the right to demand of the owner of the underlying mineral security against injury to the surface. These statutes are for the benefit of the surface owner, and his failure to exact security does not relieve the owner of the mineral from his liability for damages for injury caused by his failure to support the surface.

Georgia.

Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666 (1905). The owner of land conveyed it "with the exception of all the granite on said lot." The plaintiff, claiming title to all the granite, brought this action to recover the exposed granite and recovered. "It would seem at first glance that these deeds passed no title to any of the granite on the land which they covered. It appeared, however, that underlying all of the soil on this land lot was a foundation of granite capable of being quarried, and the auditor therefore held that it was the intention of the grantors to except or reserve only the granite which was exposed at the time that the deeds were made. We cannot agree with this construction. It is true that it appeared that in quarrying granite, it was necessary to remove the covering soil, and that it was impossible to mine it from beneath the ground like other minerals, and therefore that if the rights of the owner of the soil was subordinated to those of the owner of the granite, the result would be practically to deprive the former of all that he was supposed to get under his deed." "It would seem then that in the case of granite, where it is impossible to remove the mineral without disturbing the surface soil and completely destroying the benefits accruing to the owner of the surface, if the ownership of the mineral is in one person and that of the surface in another, the former could only exercise his

rights in taking out such granite as was exposed, from one cause or another, by the removal of the surface soil." The grantee of the granite had title thereto, though he may not have had the right to take possession of his property. This he could only do as it became exposed; he could not himself remove the soil and vegetation growing therein for the purpose of getting at the minerals.

Illinois.

Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335 (1904), affirming 109 Ill. App. 37. The owner of the soil is entitled to support from the subjacent owner; this right of support is absolute and without condition, and does not depend upon the degree of care that may be used by the subjacent owner in the prosecution of his work. If by the removal of the coal or mineral under the land, though under the most approved system of mining, the owner of the superincumbent estate is deprived of the necessary support for his land, the subjacent owner must respond in damages. But where the damages caused by the subsidence of the soil can be ascertained, and the subjacent owner is not insolvent, and the latter will be more damaged by an injunction than the owner of the surface will be benefited thereby, and it is difficult to ascertain just how the coal should be properly mined, equity will not grant an injunction, but will leave the plaintiff to his remedy at law.

Catlin Coal Co. v. Lloyd, 124 Ill. App. 394 (1906). In an action for damages for failure to support the surface, the plaintiff can recover only for injuries sustained before the action was commenced, and not for such as might occur thereafter. The jury may not consider the likelihood of further subsidence.

This is the rule in England (*Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127); but the rule in Pennsylvania is different (see *Noonan v. Pardee* and subsequent cases below.)

Indiana.

Western Indiana C. Co. v. Brown, 36 Ind. App. 44, 74 N. E. 1027, 114 Am. St. Rep. 367 (1905). The owner of minerals below the surface cannot, without liability, remove them without leaving sufficient natural or artificial support to sustain the surface. The act of a lessee of a coal mine in removing all support from the superincumbent soil is prima facie the cause of the subsequent subsidence thereof, and the burden is on the lessee to show that it would not have subsided but for the additional weight of buildings erected subsequently to the lease. Even where by express stipulation there is no liability, the lessee is not relieved from liability for injury caused by its own negligence.

A provision in a lease of coal in place, which relieves the lessee from liability for injuries to the surface, cannot affect the right of a surface owner, who acquired title prior to the lease, to recover damages resulting from the subsidence of his ground.

Paull v. Island Coal Co., 88 N. E. 959 (1909). Where the surface of land is owned by one person, and the minerals beneath by another, the owner of the minerals cannot without liability remove them without leaving sufficient natural or artificial support to sustain the surface, no matter how carefully or skillfully he has conducted his mining operations. The right of subjacent support is absolute, independent of the question of negligence.

Where, however, the deed granting the mineral right expressly states that it was mutually agreed that the grantee should not be responsible for injury to the surface resulting from removing the minerals, the grantor waived liability for damages to the surface caused by mining.

Iowa.

Collins v. Gleason Coal Co., 140 Iowa, 114, 115 N. W. 479, 18 L. R. A. (N. S.)736 (1908). Where the ownership of the surface of the land has been severed from the ownership of the minerals under it, unless the matter has been otherwise determined by contract or conveyance, the owner of the surface has absolute right to necessary support for his land. And if the owner of the minerals removes them entirely, so that injury results from the subsidence of the soil, he will be liable for the resulting damage, no matter how carefully or skillfully he may have conducted his mining operations. He must either leave pillars or ribs of the mineral itself, or put in artificial supports sufficient to sustain the soil above. In the absence of a contract waiving such support, the right is held to be absolute and not dependent upon the degree of care that may be exercised in the mining operations.

Any damage found must be based on an injury to the surface and improvements caused by said mining, and such damage can only be the difference between the value of the land before the coal was removed and the value immediately after; but in determining such difference, the damage to improvements may be considered.

Missouri.

Chicago & Alton R. Co. v. Brandau, 81 Mo. App. 1 (1899). "A servitude in favor of subjacent support exists in favor of the surface land against the mineral estate underneath it, in case one owns the surface and another the minerals. Jones on Easements, Sec. 598, and cases there cited in note 5. And it is further stated by this author in the same section that whenever there has been a separation in the ownership of the mines beneath the surface from the surface, the owner of the latter in the absence of any agreement has an absolute right to have the surface supported precisely as it was in the natural state. If the owner of the coal undertakes to remove it, as he has an undoubted right to do, and damage results to the surface, either from negligence in conducting his mining operations, or from failure to properly and sufficiently support the surface, or from both causes combined, the surface owner is entitled to compensation for the injury." But where the injury to the surface is likely to result in irreparable damage, so that

no adequate remedy can be afforded by an action for damages, the surface owner is entitled to relief by injunction.

Southwest Missouri R. Co. v. Morning Hour Min. Co., 138 Mo. App. 129, 119 S. W. 982 (1902). The right of the mine owner to mine underneath the surface of the earth is subordinate to the right of the owner of the surface that it shall be supported in its natural position; the latter is not an easement or right depending on a supposed grant, but a proprietary right at common law.

A custom among miners is not allowed to destroy the surface support by removing pillars. Such custom would be void.

Under Rev. St. 1899, § 3649, providing that injunction lies to prevent irreparable injury to real property, injunction lies to prevent a mine owner from persisting in a mode of mining which endangers the support of the surface, thereby endangering the safety of railroad tracks on the surface.

Montana.

Knipe v. Anaconda Copper Min. Co., 37 Mont. 161, 95 Pac. 129 (1908). Although there may be a subsidence of the surface of land, the mineral rights under which are owned and being operated by another, there is no right of recovery by the owner of the soil for the damage unless he can show that the mine operator caused or contributed to the injuries complained of.

Pennsylvania.

McDade v. Spencer, 6 Lack. Leg. N. 84 (1900). Where a deed of land excepts and reserves to the grantor "all coal and minerals beneath the surface of said lot of land, with the sole and exclusive right to mine and remove the same by any subterranean process, without thereby incurring in any event whatever, any liability for injury caused or damage done to the surface of said land or to the buildings or improvements which now are or hereafter may be erected thereon," the grantee, in accepting such a deed, loses the right to surface support, and the owner of the coal has the right to remove it without regard to the effect on the overlying surface.

"Where there has been a separation of the minerals from the surface, the owner of the mineral estate, in the absence of an agreement to the contrary, owes a servitude to the superincumbent estate of sufficient support. There is no custom of mining which permits the owner of a mineral estate to remove the supports and allow the surface to sink. * * * The implied right of support to the surface may, however, be excepted from the grant by apt words in the deed, and where such exception has been made, the grantor or those who claim under him may mine all the coal, even though by such mining the surface may fall in."

Allshouse's Estate, 23 Pa. Super. Ct. 146 (1903). Where there has been a separation of the coal from the surface, the owner of the latter, in the absence of agreement to the contrary, has an absolute right to have his surface supported precisely as it was in its natural state.

Authority given by a testator in his will to his executor to sell and convey the coal underlying his lands "with the usual mining privileges" does

not authorize the executor to sell and convey the coal and waive and release the right of surface or lateral support. In such a case an executor cannot be surcharged with money which he could have obtained by conveying the coal by a deed containing a waiver and release of the right of surface and lateral support.

Youghiogeny River Coal Co. v. Hopkins, 198 Pa. 343, 48 Atl. 19 (1901). A coal mining company, mining coal under a lease, was sued by the owner of the surface for injuries to the surface, and judgment was entered against it, which judgment was paid. Subsequently the coal company brought an action against its lessor to recover the amount of the judgment which it had paid. In its statement of claim it set up the payment of the judgment, and also the lease, which contained the following words: "And all damages direct or consequential, and claims therefor resulting from the mining and removal of said coal in the doing of any and all matters and things hereinbefore described, are hereby waived and relinquished by the said party of the first part, provided that the party of the second part takes all ordinary precautions usually taken in mining and removing coal." The defendant demurred to the statement. Held, (1) that plaintiff was bound under the lease to afford proper support to the overlying surface; (2) that the admission by plaintiff in its statement that there had been a recovery against it for failing to afford support was an admission that it had not used all ordinary precautions in giving proper support to the surface; (3) that there was no error in sustaining the demurrer.

Noonan v. Pardce, 200 Pa. 474, 50 Atl. 255, 86 Am. St. Rep. 722, 55 L. R. A. 410 (1901). In an action of trespass for damages for injury to the surface which was owned by the plaintiff, caused by mining coal beneath by the defendant, who was the lessee thereof from plaintiff's grantor, the court, by Dean, J., said:

"If the mining which caused the subsidence was more than six years before suit brought, and the injury occurred within six years, even though the miner or operator was still in possession, he is not answerable in damages, for there is no right of action for damages until the damage occurs.

"The first question raised by the assignments of error, is, what was the date of the cause of action? A cause of action is that which produces or affects the results complained of. Where there has been a horizontal division of the land, the owner of the subjacent estate, coal or other mineral, owes to the superincumbent owner, a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is, sufficient support, even if to that end, it be necessary to leave every pound of coal untouched under his land. *Berwind v. Barnes*, 13 Weekly Notes Cas. 541; also the English case, *Harris v. Ryding*, 5 M. & W. 59, in which Baron Parke uses this language: 'I do not mean to say that all the coal does not belong to the defendants, but they cannot get it without leaving sufficient support.' We have followed rigidly this rule, as thus tersely suggested, in all our decisions

on the subject, and they have been many. Of course, defendant had a right to all the coal under this lot, but, he had no right to take any of it, if thereby, necessarily, the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface. So, there is nothing gained by adducing evidence of good or bad mining, or by a discussion of that subject.

"The adjacent owner in this case, at some time failed in duty to the owner of the surface of this lot. The mere fact, that it caved in because the coal had been mined underneath, demonstrates this failure. When the coal was removed without leaving sufficient pillars, or without supplying sufficient artificial props, was the time when the subjacent owner failed in an absolute duty he owed to his neighbor above. And from that, dates the cause of action. Unless, when the coal was mined, the miner left no pillars, or too few, or of too small dimensions for such a mine, or did not replace the coal with ample artificial durable props, there was no cause of action." The decision of the Queen's Bench in *Bonomi v. Backhouse* is preferred to that of the Exchequer Chamber and the House of Lords as "by far the most satisfactory in its reasons and more in accord with the conditions of coal mining in this country." The case of *Lewey v. Fricke Coal Co.* (see Vol. 1, p. 702) is clearly distinguishable from this. There "the defendant from an adjoining mine had mined and removed the plaintiff's coal underneath his land, yet did not disclose the fact and plaintiff did not discover it until after the six years had run. We held, on the facts of that case, that the statute only began to run from the time of plaintiff's discovery, and this on the grounds, that the mining of his coal was a wrong and the concealment of the wrong a fraud. He had no means of discovery; had no right of access to the mine to make observations and defendant no right at all under his land; he had no reason to suspect or presume, that one who had no claim of right would wrongfully enter on his land and dig his coal. But here, the parties who mined this coal, had a right so to do; a right reserved by the original owner; the surface owner, too, had a right of sufficient support; these mutual rights gave the surface owner access to the mine to see that his right was being maintained by the performance of the duty owing to him by the coal operator. And the courts will enforce this right of access if the mine operator denies it; this has been decided in a number of cases. In this case, the right of action arose when the mine operator failed to furnish sufficient support; that may have been more than six years before suit brought, or it may not; it may have been partly due to mining before and partly to mining afterwards, in which latter case, the action would not be barred; if wholly due to the removal of coal six years before suit brought and failure then to leave sufficient support, the action would be barred. The date of the 'cave in,' and partial destruction of the house, is not the date of the cause of action, that was only the consequences of a previous cause, whether one month or twenty years before. It is argued, that in some cases, the surface owner could not know by the most careful observation whether the mine owner had neglected his duty within six

years. We answer, that is only one of the incidents attending the purchase of land over coal mines; it is not improbable, that this risk enters largely into the commercial value of all like surface land in that region. But, however this may be, we hold that the miner is not forever answerable for even his own default; further, in no case is he answerable for the default of his predecessor before his possession. Neither equity nor law demands, that any greater burden should be placed upon him than that indicated; any heavier one would encourage the purchase of surface over coal mines for speculation in future law suits. We cannot concur in the argument that plaintiffs could have had no cause of action antedating their deed. By their conveyance there passed to them all the rights of their grantor. If the cause of the injury was within six years, although at the date of the deed the damage was not susceptible of computation, yet afterwards became so by the subsidence of the surface, their right to sue was then fixed, a right which, from the nature of the case, could not have had more than a doubtful existence before the actual damage occurred."

"When the right to sufficient support has been violated, the cause of action, it is true, arises, but the owner in possession, when the consequences follow, is the one who suffers. There may, in the interval, have been several owners, none of whom sustained damage except the last; he alone has the right to sue, because to him only has passed the right to enforce by suit the collection of a damage occurring during his possession. Until they actually occur, no one can tell when they will occur, or that they ever will. Each grantee has the right to presume that the subjacent owner has performed his legal duty, and the price, while probably somewhat depreciated by the possible risk, is not fixed on a presumption, that his land will subside because of any special failure in duty on the part of him who has taken out the coal.

"There is some evidence tending to show that the 'cave in' was because of work within six years by defendant, in the Mammoth seam, the first stratum of coal below the surface; also evidence tending to show very recent mining in the Wharton seam, the next one underneath the Mammoth, and that from one or the other cause, or from both combined, the subsidence was caused. On the whole case we deduce these propositions:

"1. If the failure to furnish sufficient support to the surface was from mining either by defendant or his predecessors, more than six years before suit, the action is barred by the statute of limitations.

"2. The right to sue passes to the surface owner who is in possession when the subsidence occurs, without regard to the date of his conveyance; this right is barred by the statute of limitations if the cause of the subsidence arose more than six years before suit brought.

"3. Even if the main body of the coal under plaintiff's land has been mined out more than six years before suit brought, yet, if defendant has done additional mining by removal of coal left in previous work, or by robbing of pillars within six years before suit, and without such additional mining the surface would not have subsided during plaintiff's occupancy, yet if such additional work or mining hastened the result, the defendant is answerable in damages therefor.

"4. If defendant, by mining within six years another underlying seam (the Wharton), whereby the pillars and support left in the seam above (the Mammoth), which otherwise would have been sufficient support to the surface, have been rendered insufficient, and the 'cave in' occurred, defendant is answerable to plaintiff in damages.

"5. If plaintiffs be entitled to recover, their measure of damages is the actual loss they have sustained to their land, including the building thereon, by reason of the 'cave in.' The difference in the market value before and after the injury in this class of cases is not the true rule; in this case, under the evidence, perhaps it worked no injustice, but in many cases it would do so."

Matulys v. Philadelphia & Reading Coal & Iron Co., 201 Pa. 70, 50 Atl. 823 (1902). Where the owner of land conveys it to another, reserving the minerals, and afterwards in mining under adjacent land so conducts its operations that the surface subsides and causes the surface of the land previously conveyed to crack and open, it is liable for the injuries resulting from the withdrawal of lateral support, irrespective of provisions in the conveyance relieving it from obligations of surface support.

"The case is one of injury resulting to a land owner from the withdrawal of lateral support by an adjoining owner in its mining operations on its own land. The plaintiff was entitled to the natural lateral support of her ground, and, if the same was withdrawn by her neighbor in mining operations on its own land, for any injury to her lots resulting from the withdrawal of such support, compensation must be made. The right to such lateral support is an absolute one, and the adjoining owner who withdraws it, whether negligent or not, in excavating or mining his land, is liable for injuries resulting to his neighbor's ground."

"As this absolute right to lateral support is limited to the land itself in its natural condition, there can be no recovery for injuries to buildings or improvements resulting from the withdrawal of such support, in the absence of proof of negligence or carelessness in excavating or mining on the adjoining land."

"So far as the buildings of the appellee are concerned—and, for that matter, her land itself—nothing can be found in the testimony showing negligence or carelessness by the appellant. Nothing that it did on its own land in its mining operations indicates any negligence or want of care towards its neighbor, and it could not reasonably have anticipated that, even if it failed to properly support its own surface, the peculiar injury complained of would result. Negligence or want of due care in withdrawing lateral support in excavating or mining on adjoining land, for which there is liability for injury to a neighbor's buildings, means positive negligence or manifest want of due care in the excavations or mining so far as they affect, or are likely to affect adjoining improvements."

Pantall v. Rochester & Pittsburg Coal & Iron Co., 204 Pa. 158, 53 Atl. 751 (1902), affirming 18 Pa. Super. Ct. 341 (1901). "It was held in *Noonan v. Pardee*, 200 Pa. 474, 50 Atl. 255, that where there has been a horizontal division of land, and the owner of the subjacent estate removes coal or other mineral without leaving sufficient support, in consequence of which

the surface sinks, the cause of action is the removal of the coal, not the subsidence of the surface, which is only consequence and evidence of the wrongful act of removal. The subject is one of inherent difficulty. On the one hand the surface owner may suffer no actual damage, and be in entire ignorance of any invasion of his rights until the statute of limitations has barred his remedy. On the other hand, the mine owner, using every care, may be called upon to respond to a claim of damages occurring years after his operations have ceased, his evidence lost, and his liability made doubtful by other intervening causes. No rule can be framed which may not at times inflict great hardship on one party or the other. Courts of the highest authority have differed on the rule to be adopted. In *Noonan v. Pardee* the subject was most carefully considered, and the rule followed which seemed to rest on the soundest principles, and to be in accord with the best authorities."

Where in an action against a coal company to recover damages for subsidence of surface the case is tried in the court below and argued in the superior court, on the theory that the cause of action was the subsidence of the surface, and not the removal of the coal, and the defendant in the common pleas, who has the appellant in the superior court, acquiesces in this theory, and makes no attempt to assert the correct rule as subsequently established in *Noonan v. Pardee*, that the removal of the coal was the cause of action, he has no standing on an appeal from the superior to the supreme court to assert the correct rule.

In such a case, where an owner of sixty acres of land institutes a suit against the owner of coal under the land to recover damages for a subsidence of the surface due to alleged improper mining, and in his statement limits his claim to only twenty-nine acres of the sixty acres, and notifies the defendant that he will claim damages for the injury to twenty-nine acres up to the date of the trial, and at the trial he recovers a verdict on which judgment is entered, he may subsequently maintain an action to recover damages for injuries to the other thirty-one acres, where it appears that surface indications of subsidence of the surface of the thirty-one acres began between the date of the institution of the first action and the trial of the first action, although there had been no mining after the date of the institution of the first action.

Youghiogeny River Coal Co. v. Allegheny Nat. Bank, 211 Pa. 319, 60 Atl. 924, 69 L. R. A. 637 (1905). The defendant being the owner of the coal underlying a tract of land sold the same to the plaintiff and gave it an obligation, conditioned to "well and truly protect and indemnify said Y. R. C. Co. from any liability from any damage which may result to the surface * * * or to improvements thereon, by reason of the skillful and careful mining and taking away of the said coal." The owner of the surface sued the plaintiff for injuries arising from the subsidence of the surface, and recovered verdict and judgment therefor. The plaintiff then brought this suit on the bond of indemnity, alleging that it had mined in a skillful and careful manner, etc. Defendant demurred on the ground that the admission that there had been a recovery by the surface owner

was an admission that plaintiff had not used all ordinary precautions in giving proper support to the surface. The demurrer was not sustained. "We are of opinion that the words 'skillful and careful mining', used in the defendants' obligation of February 29, 1892, relate to the manner of working the coal, and do not impose upon the plaintiff company in operating the coal the duty of leaving proper and sufficient supports for the surface. If, therefore, the plaintiff exercise care and skill in its mining operations it may mine and remove all the coal, and the defendants must indemnify the company against any damage resulting from injury to the surface which it may be compelled to pay the surface owner." Brown and Dean, J. J., dissent.

Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 Atl. 559 (1905). The owner of land conveyed it, reserving the minerals with the right to mine and take away the same "without making any compensation * * * for any effect upon or injury to the said lot or piece of ground or the surface thereof * * * or to the buildings thereon erected, in consequence of mining." This relieved the grantee of the obligation of surface support, the rule as to which has no application where the same person is the owner of both estates, nor where by contract the parties have covenanted for a different rule. It makes no difference that the failure to support arose from negligent mining. An allegation of negligence raises an immaterial issue.

Rabe v. Shoenberger Coal Co., 213 Pa. 252, 62 Atl. 854, 3 L. R. A. (N. S.) 782, 5 A. & E. Ann. Cas. 216 (1906). In an action of trespass by the owner of the surface of land against a mining company, which in mining the coal has failed to leave sufficient support for the surface, and has destroyed five springs, the measure of damages is the permanent depreciation of the value of the farm caused by the destruction of the springs. The springs cannot be valued as independent pieces of property, but as elements going to make the value of the farm as a whole.

If, in such a case, it appears that the loss of one spring was supplied by piping water from another, the damage in so far as that particular one is concerned is the cost of piping.

Miles v. Pennsylvania Coal Co., 214 Pa. 544, 63 Atl. 1032 (1906). The owner of a tract of land made a lease to defendant of all merchantable coal in the property that could be worked, "together with the right to mine and remove said coal in said veins until all the merchantable coal has been mined and removed from said veins on said hereby leased premises." It provided for the method of mining, the royalty and method of payment, etc., and contained this clause: "And it is hereby further agreed that the said lessee shall not be liable for any falling in of any part or parts or all of the surface of the said hereby demised premises in consequence of the mining and removing of all of the said coal, and the said lessors shall indemnify the lessee against any liability for any falling in of any surface of any lots in said demised premises, the surface of which may have been sold by said lessors." It further provided that "if said lessors may wish at any time to have more pillars left in the mines than it appears to be the in-

tention of the said lessee to leave, or that said lessee may have left in similar workings in said hereby demised premises the said lessors may, by written notice to said lessee, designate where and in what manner such pillars are to be left."

On a bill to restrain defendant from mining all the coal without provision for surface support, the court below refused a preliminary injunction. The appellate court held that this was not a case for such an injunction and declined to express an opinion on the merits.

Weaver v. Berwind-White Coal Co., 216 Pa. 195, 65 Atl. 545 (1907). The owner of a tract of land granted all the merchantable coal underlying it, excepting five acres "of the 'D' bed of coal underlying the buildings and springs", "with the right to mine and carry away all the said coal and with all the mining rights and privileges necessary or convenient to such mining and removal of the same." This did not constitute a waiver of the right of surface support under all of the tract not excepted as above. "If the grantor had conveyed all the coal underlying the entire tract without any reservation, it must be conceded that the owner of the superincumbent strata would be entitled to surface support. The fact that he cut down the grant, reserving five acres for which no compensation was paid and no title conveyed, cannot be construed to mean that appellee is in worse position in so far as his right to surface support is involved, than if the five acres had been included in the grant and compensation received therefor. It is clear that appellee did not by express grant, nor by necessary implication, nor by any covenant contained in the deed of conveyance, waive the right to surface support."

"The rule is settled that the measure of damages for permanent and irremedial injuries to land caused by failure to give surface support is the actual loss in the depreciation of the value thereof. The permanence of the injury is the test for the application of the rule: *Noonan v. Pardee*, 200 Pa. 474, 50 Atl. 255, 86 Am. St. Rep. 722, 55 L. R. A. 410. If the injury is reparable the cost of repairing may be recovered, and if the cost of repairing is greater than the diminution in the market value, the latter is the true measure of damages. In all such cases just compensation for the loss sustained by the trespass is what the injured party is entitled to recover. When the injury is permanent the measure of damages is the difference in market value before and after the injury." Where the injury consists of the destruction of springs, they cannot be valued as independent pieces of property, but only as elements going to make up the value of the land. Where the destruction of springs has been occasioned by mining and removing coal which the lessee had a right to remove in the usual course of his mining operation, the owner of the surface has no right to complain; but it is otherwise where the destruction of the spring results from the removal of the pillars which provided surface support, thus causing a subsidence thereof, and breaks in the strata which destroyed the springs. If the evidence is conflicting as to which of the two was the cause of the destruction of the springs, the case is for the jury.

Miles v. Pennsylvania Coal Co., 217 Pa. 449, 66 Atl. 764, 10 A. & E. Ann. Cas. 871 (1907). The court below having granted a permanent injunction (see *Miles v. Pennsylvania Coal Co.*, 214 Pa. 544, 63 Atl. 1032), its judgment is affirmed. "It is settled law in this state that, in the absence of a contract providing the contrary, the owner of the mineral estate in a tract of land owes a duty, *ex jure naturae*, to the owner of the superincumbent estate of absolute support to the surface. The owner of the coal, like the owner of the surface, has an estate in land, but the former holds his subject to the right of the latter to demand that he do no injury to the surface by removing the coal. As we have said in a former case, the owner of the mineral must support the surface if it requires every pound of coal to be left in place for that purpose. There can be no doubt that such are the reciprocal rights of the owners of the surface and of the mineral estate in this commonwealth. The several cases of this court on the subject conclusively determine the question.

"While, however, the owner of the surface is entitled as of natural right to its support by the owner of the subjacent mineral estate, it is equally well settled that the common owner of both estates, or the owner of the fee simple title to the tract of land, may by contract relieve the owner of the mineral estate from any duty to support the surface and from liability for any injury or damage done to it by mining and removing all the mineral. Being the common owner of the whole title and, therefore, having the *jus disponendi*, he may make any legal disposition of the property he may desire. He may sell the coal and retain the surface, or he may sell the surface and retain the coal. In selling or leasing the coal, he may grant such rights to the vendee or lessee as either may desire or deem proper or necessary to remove the entire body of coal, as well as such rights in, through or over the surface as may be necessary for the same purpose. In other words, having the absolute dominion over the property he may grant such rights therein and thereto as may be agreed upon and are stipulated for in the contract. This naturally and logically follows from his ownership of the fee simple title to the property."

"The contract grants in terms all the coal, with the right to mine and remove it. The surface rights, it will be observed, are unlimited and substantially confer authority upon the lessee to use the surface to the exclusion of its owners. The rights of the lessee company to the surface could scarcely be greater if the lessors had granted it the fee during the continuance of the mining operations. These stipulations show the intention of the parties in entering into the contract, and that the manifest purpose on the part of the lessors was to realize upon the entire mineral estate.

"In addition to the intention of the lessors, thus clearly disclosed, that the lessee should mine and remove all the coal without regard to the injury done the surface, it is specifically covenanted in the agreement as follows: 'It is hereby further agreed that the said lessee shall not be liable for any falling in of any part or parts or all of the surface of the said hereby demised premises in consequence of the mining and removing of all of the said coal, and the said lessors shall indemnify the said lessee against any

liability for any falling in of any surface of any lots on said demised premises the surface of which may have been sold by said lessors.' Here is an express covenant by the lessors not only relieving the lessee from injury to the surface in consequence of the mining operations in removing all the coal, but also indemnifying the lessee against liability for injury that may be done to the surface of any lots which may be owned by other persons than the lessors. Read in connection with the stipulations in the lease granting the right to remove all the coal, this covenant against liability for injury to any part of the surface arising from the act of mining and removing all of the coal is conclusive against the contention of the lessors that the lessee is required under the lease to leave pillars or any part of the coal for the support of the surface."

The provision which gave the lessors the right to examine the mine and designate what pillars should be left did not prevent the removal of the pillars. Its purpose was to enable the lessors to ascertain whether the operations were being conducted so that all the merchantable coal could be removed. "Had the pillars been removed or an insufficient number of pillars been left in the progress of the mining, it is apparent that it would have greatly diminished the quantity of coal which could have been removed from the mine, and consequently the amount of royalty which the lessors would have received. It was therefore necessary that the lessors secure their interests by a provision in the contract that they might, at any time during the progress of the mining, require the lessee to protect the mine by additional pillars of such extent and in such locality as the lessors might designate. This was the manifest purpose of the clause in question. After all the coal, except the pillars, had been mined, and the pillars were no longer needed to protect the mine and the mining operations, the lessee was authorized by the contract to remove them and account to the lessors for the royalty."

Tischler v. Pennsylvania Coal Co., 218 Pa. 82, 66 Atl. 988 (1907). "The alleged causes of the injury to the plaintiff's surface were not only the withdrawal of proper supports for the surface within six years of bringing the suit, but also the negligent mining of the coal within the same time. If either or both of these causes were sustained by the testimony the plaintiff was entitled to recover: *Pringle v. Vesta Coal Co.*, 172 Pa. 438. The court instructed the jury that the cause of action arose, not when the cave or subsidence took place, but when the support of the surface was so weakened that it might fall, and told them that the cause must have occurred within six years of bringing the suit. He further instructed them that if there was work in the mines directly beneath the plaintiff's surface which caused the weakening of the supports to the surface within six years the plaintiff could recover for injury to the land and the improvements thereon. He also instructed them that the plaintiff was entitled to lateral support of the surface in its natural state and that she could recover compensation for the surface in its natural state only if the cave or subsidence was caused by taking away the lateral support. It is, therefore, clear that the judge was accurate in his statements of the law as

applicable to the case. Under this charge the plaintiff was entitled to recover if she showed to the satisfaction of the jury that the coal beneath her surface had been removed or that there had been negligent mining of the coal which, in either or both instances, resulted in injury to the plaintiff's surface and the buildings thereon; and was entitled to recover for the injury done the surface in its natural state only if such injury was caused by failure to give lateral support.

"As appears by the evidence, the plaintiff's predecessors in title since 1871 were the owners of the surface and not of the coal. One of these parties in the plaintiff's chain of title, Livingston, conveyed the property in 1897, excepting the coal, and reserving the right to remove it without liability for damages. At no time, so far as the evidence discloses, did Livingston have title to the coal. The exception, therefore, in his deed amounted to nothing, and the defendant company, which was a stranger to his title, could not protect itself by the reservation to Livingston of the right to remove the coal."

Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 Atl. 329 (1908). Plaintiff conveyed to defendant's grantor all the coal and other minerals, except the limestone, underlying a farm of 119 acres, "with all the mining rights and privileges necessary or convenient to such mining and removal of the same." Defendant removed the coal from one seam under half of the farm without leaving pillars or other supports. As a result the surface subsided in several places, and the springs of water on the land ceased flowing. The plaintiff filed a bill in equity to enjoin the defendant from removing the pillars yet remaining, so as to cause subsidence of the surface. The court below granted an injunction, and this was held to be error.

"The right to surface support was not expressly waived in the deed of conveyance, and, therefore, the owner of the surface is entitled to the benefit of the rule which imposes upon the underlying or mineral estate the servitude of sufficient support to the upper or superincumbent strata: *Weaver v. Berwind-White Coal Co.*, 216 Pa. 195, 65 Atl. 545. This is the settled rule of law in Pennsylvania, and nothing said or decided in the present case is intended to weaken or modify it. Each party to this proceeding stands upon certain legal rights and the principal inquiry must be whether the appellee, under the facts produced at the hearing in the court below, is in a position to ask a court of equity to interfere by injunction. No general and unbending rule can be laid down in such cases. Much depends upon the facts of each particular case. Of course, if the injury complained of is irreparable so that it cannot be adequately compensated in damages, or if the act intended to be committed is in the nature of a trespass, or tort, or if the wrong sought to be redressed amounts to a nuisance, which by reason of the persistency with which it is repeated, threatens to become permanent, courts of equity will interfere by injunction to prevent such wrongs: *Commonwealth v. Railroad Co.*, 24 Pa. 159; *Stewart's Appeal*, 56 Pa. 413; *Allison's Appeal*, 77 Pa. 221; *Bitting's Appeal*, 105 Pa. 517; *Walters v. McElroy*, 151 Pa. 549. The present case does not come within the reason or spirit of the rule announced in these

cases. Under the facts of the case at bar it cannot be successfully contended that the injury is irreparable, at least in the sense that it cannot be adequately compensated in damages and certainly the mining and removing of coal by the party who owns it and has the right to remove it, and whose operations are conducted by the most approved methods known in mining operations, cannot be said to be a trespass, or tort, or nuisance, within the meaning of the rule of the above cited cases in which equitable relief has been granted."

"If the threatened injury is of an irreparable character which could not be compensated in damages by an action at law; or if buildings or other permanent improvements would be endangered; or if overlying strata of coal, or other mineral estate, would be seriously and permanently disturbed or displaced, by the mining of all the coal, it is clear equity would in proper case intervene to restrain such acts, even before the injury had been done. But none of these conditions are shown to exist in the present case." Mestrezat, J., dissented.

Dignan v. Altoona Coal & Coke Co., 222 Pa. 390, 71 Atl. 845, 128 Am. St. Rep. 812 (1909). A deed conveying all the coal and other minerals under a tract of land contained the following provisions: "And the said party of the second part is hereby granted the full and exclusive privilege, right and liberty of entering at will upon said land and searching for, quarrying and mining, raising, delivering, taking and carrying away said coal and other minerals, such mining operations however are not to interfere with the surface of said land, which the said party of the first part reserves and is not conveyed by these presents, excepting the right, privilege and liberty which is hereby granted to the said party of the second part of sinking a shaft on said premises for an air passage or opening into such mines as may be opened and used thereon, also the right and privilege of sinking a shaft for the purpose of pumping out and up such water as may interfere with the mining operations upon said land, with the privilege of erecting thereon such building or buildings as may be necessary and incident to said pumping of water from said mines the air and water passages referred to above are not to be erected or opened within two hundred yards of the house and barn on the premises herein described; the said party of the second part to have free ingress, egress and regress through and underneath said premises for the purpose of mining, removing, shipping and transporting said coal and other minerals: and all of the said rights, liberties and privileges to be used and exercised without any liability for damages arising or resulting from the use and exercise of the same as aforesaid." It was held that the last clause was not a waiver of the right of surface support. "In Pennsylvania the rule has always been that in a grant of all the coal underlying a tract of land, the grantor, in the absence of an express waiver, or, which is the same thing, the use of words which by necessary implication mean a waiver, is entitled to have his surface reasonably supported by the coal stratum granted. * * * It has been uniformly held that the grant of all the coal does not affect the rule which imposes the servitude of surface support

upon underlying strata. * * * The release of damages in the covenant relied on refers to the proper exercise of the mining rights and privileges in the development and operation of the mines and have (has) no bearing upon or relation to the rule of law requiring surface support."

Dilts v. Plumville Railroad Co., 222 Pa. 516, 71 Atl. 1072 (1909). See this case on page 245, above.

Kellert v. Rochester & Pittsburgh Coal & Iron Co., 228 Pa. 27, 74 Atl. 789 (1909). A conveyance of all the coal underlying the land of the grantor conferred the right of ingress and egress for the purpose of searching for, mining, manufacturing and preparing the coal for market, storing, removing and transporting the same, and also the right to build roads and drains, and such buildings as may be necessary and proper for the working of the mines, and the right to deposit waste material upon the surface, and also provided that the grantor released "all and every claim or claims for damages to the said land caused by operating or working of said mines in a proper manner." The owner of the coal was held not to be liable for damages to the surface by reason of the removal of all the coal. The only liability which he would have would be that which arose from an improper manner of operating or working the mines, and the removal of all the coal is not such.

Such a release of liability is binding upon subsequent grantees of the surface.

West Virginia.

Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115 (1905). Plaintiff conveyed to defendant the coal underlying a tract of land with the right to "excavate and remove all of said coal." Held he had no right of surface support.

Where a deed conveys the coal under a tract of land together with the right to enter upon and under said land and to mine, excavate and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position. Such a deed should be construed in the same way as other written instruments and the intention of the parties as manifested by the language used should govern.

This case is contrary to the law as laid down and accepted in every other jurisdiction. See Vol. 1, p. 676. (*Burgner v. Humphreys*, 41 Ohio St. 340; *Carlin v. Chappel*, 101 Pa. 348; *Williams v. Hay*, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719; *Weaver v. Berwind-White Coal Co.*, 216 Pa. 195, 65 Atl. 545.) The opinion of the majority denies the accepted doctrine. In the words of the dissenting opinion, "it demolishes at one fell blow the entire system of English and American law on the subject."

II. LATERAL SUPPORT.

p. 686.

Illinois.

Donk Bros. Coal & Coke Co. v. Norero, 135 Ill. App. 633 (1907). Where subsidence is occasioned by removal of the lateral support due to mining operations beneath the surface, there is liability for injuries to artificial structures. Where the injury would have resulted from the act if no buildings existed upon the surface, the act creating the subsidence is wrongful, and renders the owners of the mines liable for all damages that result therefrom, as well to the buildings as to the land itself. The owner of the premises being entitled to have them intact, the measure of damages in such case is the cost of restoring them to their original state.

Pennsylvania.

Matulys v. Philadelphia & Reading Coal & Iron Co., 201 Pa. 70, 50 Atl. 823 (1902). See this case on page 633.

Tischler v. Pennsylvania Coal Co., 218 Pa. 82, 66 Atl. 988 (1907). See this case on page 639.

West Virginia.

Mapel v. John, 42 W. Va. 30, 24 S. E. 608, 57 Am. St. Rep. 839, 32 L. R. A. 800 (1896). Code 1891, p. 668, c. 70, § 7, provides, "No owner or tenant of any land containing coal shall open or sink, or dig, excavate or work in any coal mine or shaft, on such land within five feet of the line dividing said land from that of another person or persons without the consent in writing of every person interested in or having title to such adjoining lands in possession, reversion or remainder, or of the guardians of any such persons as may be infants. If any person shall violate this section, he shall forfeit five hundred dollars to any person injured thereby who may sue."

This statute is constitutional. It is a proper exercise of the police power.

The fact that by the title to defendant's land there is annexed to it a privilege to take coal from a certain open bank on plaintiff's land does not except him from the obligation of the act.

CHAPTER XXII.

MINING ON THE LAND OF OTHERS—TRESPASS.

p. 689. Possession of the apex of a vein within the surface lines of a claim, the owner of which is entitled to extralateral rights, is possession of the vein on its dip or downward course outside of the surface lines of the claim. The owner of such a vein may maintain an action of trespass against one who mines upon its dip, and may recover damages for the removal of ore therefrom, whether the trespasser be the owner of the claim from beneath whose surface the ore is taken or an entire stranger.

The courts of Colorado, Indiana and Oregon have adopted the rule that, in trespass for taking ore from the land of another, the measure of damages as against an unintentional wrongdoer is the value of the ore in the mine, but as against an intentional trespasser it is the value of the ore without deduction for the labor which he has bestowed upon it. To this is also to be added any permanent damage done to the mine or the land. In Alabama, however, the unintentional trespasser is held for the value of the mineral as it lies in the mine after being severed from the land. (See a note on this subject in 20 Harvard L. R. 227.) Double damages may be recovered for willful trespass in Iowa, Code 1897, § 2485; and trespassing upon a mine and taking ore therefrom is made a misdemeanor by Iowa, Code 1897, § 4829; Missouri, Rev. St. 1899, § 8782, and Ohio, Bates Rev. St. 1906, § 6881.

A trespass is presumed to be intentional. The burden of proof is on the trespasser to show that his act was innocent or unintentional. It is not enough to show that he did not intend to commit a trespass. He must prove that he did not intend to do the act which amounted to a trespass. Negligence in ascertaining boundaries does not establish willfulness, but an intentional omission or a reckless disregard of care does so. If the minerals are taken under a claim of right, subsequently determined not to exist, the trespasser may nevertheless be held innocent, if he acted upon an honest and well founded belief in his claim of right

which depended for its existence solely on a question of law. The test is not the violation of law in the light of the maxim that ignorance of the law does not excuse, but whether his mistake was honest and his action taken in good faith.

United States.

Argonaut Min. Co. v. Kennedy Min. & Mill. Co., 84 Fed. 1 (1897). C. C. N. D. Cal. An action for trespass upon an unpatented mining claim does not arise under the law of the United States and is not removable from a state to a federal court on that ground.

Johnson v. C. & N. W. Sand & Gravel Co., 30 C. C. A. 35, 86 Fed. 269 (1898). 7th Circ. The true owner out of possession cannot maintain trespass or case for injury to the freehold or for the severance and conversion of a portion of the freehold, against one in open, notorious, exclusive, adverse and hostile possession claiming under color of title in good faith.

Durant M. Co. v. Percy Consol. M. Co., 35 C. C. A. 252, 93 Fed. 166 (1899). 8th Circ. "One who unintentionally, and in the honest belief that he is lawfully exercising a right which he has, enters upon the property of another and removes his ore, * * * is liable in damages for the value of the ore * * * in its original place, and for no more. He may limit the recovery of the owner by deducting from the value of the ore at the mouth of the shaft the cost of mining and transporting it to that point.

* * * But one who wilfully and intentionally takes ores from the land of another must respond in damages to him for the full value of the property taken, at the time of his conversion of it, without any deduction for the labor bestowed or expense incurred in removing and preparing it for the market."

It is error to charge the jury that the trespass was willful and intentional, if the defendant was negligent in discovering the line between his property and the plaintiff's.

Golden Reward Min. Co. v. Burton Min. Co., 38 C. C. A. 228, 97 Fed. 413 (1899). 8th Circ. The statutory rule (Comp. Laws Dak. 1887, § 4603) for the assessment of damages which entitles a plaintiff in the state of South Dakota, whose property has been there wrongfully taken and converted, to demand "the highest market value of the property at any time between the conversion and the verdict, without interest," provided the action has been prosecuted with reasonable diligence, is properly applicable to a suit brought to recover damages for a wrongful entry by the defendant upon the plaintiff's mining property and for the removal therefrom and conversion to the defendant's own use of a large amount of gold and silver-bearing ore. The form of the action should not deprive a plaintiff of the benefit of the rule, when the action is essentially one for the wrongful conversion of personal property, and when no other kind of damage is recovered.

Montana Min. Co. v. St. Louis Min. & Mill. Co., 42 C. C. A. 415, 102 Fed. 430 (1900). 9th Circ. Where the defendant in an action of trespass com-

plaints that the verdict should not include the value of ore which it had mined, but had stored away under an injunction order, it must show that it has returned such ore to the plaintiff or tendered its return or otherwise accounted to the plaintiff for its value.

In an action of trespass for removing ore from a vein under defendant's premises, the apex of which vein is within the surface lines of plaintiff's claim, but which is not the discovery vein, the complaint is sufficient if it allege ownership of all precious metals contained in any vein or lode of mineral bearing rock, through their entire depth, whose apex is within the surface of complainant's claim, and that the ores in controversy were mined from a vein which did so apex. The complaint need not allege in order to sustain his extralateral rights the course of the discovery vein or the direction of its dip.

Possession of the apex of a vein in the surface of one claim is actual possession of the vein as it dips beneath the surface of another claim, and entitles the owner of the claim, in whose surface the apex is, to maintain an action of trespass against the owner of the claim beneath whose surface the vein dips, for taking ore from the vein. "We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such a possession is not constructive but actual."

United States v. Homestake Min. Co., 54 C. C. A. 303, 117 Fed. 481 (1902). 8th Circ. "The measure of damages for the reckless, willful or intentional taking of ore or timber from the land of another without right is the enhanced value of the ore or timber when it is finally converted to the use of the trespasser. But the limit of the liability for damages of one who takes ore or timber from the land of another without right through inadvertance or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees."

"The test to determine whether one was a willful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief, and his actual intention at the time he committed the trespass; and neither a justification of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a willful trespasser."

Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 64 C. C. A. 180. 129 Fed. 668 (1904). 8th Circ. "The measure of damages for the reckless, willful, or intentional taking of ore from the land of another without right is the enhanced value of the ore where it is finally converted to the use of the trespasser. The measure of damages for wrongfully taking ore from the land of another through inadvertance or mistake, or in the honest belief that one is acting within his legal rights, is the value of the ore in the mine. The wrongful taking of the ore in the absence of all other evidence, raises a presumption of fact that the trespasser took it intentionally and willfully. This presumption, however, is a disputable one.

* * * The trespasser may overcome it, and may limit the recovery

against him to the lower measure of damages, by proof presented on behalf of the owner, or on his own behalf, that he took the ore unintentionally, in good faith, in the honest belief that he was lawfully exercising a right which he possessed."

Mere negligence, of the character described by the word "inadvertence," in ascertaining the limits of the lands or rights of lands or rights of the owner, will not alone sustain a finding of that recklessness, fraud, bad faith, knowledge, or intent requisite to establish a willful trespass, but it is competent evidence upon the issue of willfulness or innocence.

An intentional omission, however, to exercise care to ascertain such limits, for the purpose of maintaining ignorance regarding them and trespassing upon them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit damages to the lower measure as knowledge of the owner's rights and an intent to violate them.

United States v. Ute Coal & Coke Co., 85 C. C. A. 302, 158 Fed. 20 (1907). 8th Circ. "One who unintentionally, and in the honest belief that he is lawfully exercising a right he has, enters upon the property of another, and removes his ore, his coal, his timber, or any other valuable appurtenant to his real estate, is liable in damages for the value of the ore, coal, timber or other personal property in its original place and for no more. But one who willfully and intentionally takes ore, timber or other property of another, and appropriates it to his own use, must respond to the owner for the full value of the property taken at the time of its conversion without any deduction for the labor bestowed or expense incurred in removing and preparing it for market. There is a legal presumption that one who takes or converts to his own use the property of another intends so to do, and a jury may lawfully infer from such taking and conversion and the wrongdoer's reckless disregard of the owner's right and title that he had knowledge of that right and title, and intended to appropriate his property to his own use in the absence of persuasive evidence of his innocence and good faith."

The wrongful taking of coal or ore from a mine does not divest the title of the owner, and one who obtains and disposes of it with notice or knowledge that it had been intentionally wrongfully taken is liable for its value when and where he disposes of it.

Turner v. Seep, 167 Fed. 646 (1909). C. C. E. D. Okla. Where oil is extracted from land by an innocent trespasser, the measure of damages is not the full value of the oil taken, but its value in the ground. The most practicable means of determining this is by the prevailing royalty at the time.

Morgan v. United States, 94 C. C. A. 518, 169 Fed. 242 (1909). 8th Circ. See this case also on page 609.

Central Coal & Coke Co. v. Penny, 97 C. C. A. 600, 173 Fed. 340 (1909). 8th Circ. In an action for conversion of coal removed from beneath plaintiffs' land, it was not error for the court to charge as follows: "The rule for the measure of damages in cases of trespass in taking the coal of another depends upon the circumstances under which the coal was taken.

If you find that the coal was either recklessly, willfully, or intentionally taken by the defendant company from the land owned by plaintiffs, without right, then the measure of damages is the enhanced value of the coal at the mouth of the shaft, or where it was finally converted to the use of the defendant. But if you should find that the defendant took and converted the coal from the land owned by the plaintiffs through inadvertence or mistake, or in the honest belief that it was acting within its legal rights, then the measure of damages is the value of the coal as it was in the ground before it was disturbed by the defendant. The wrongful taking of coal, in the absence of any explanation or other evidence, raises a presumption of fact that the trespasser took it intentionally and willfully. That presumption, however, is a disputable one, which evidence may so completely overcome as to remove the presumption that it was intentionally and willfully done."

There was evidence that the plaintiffs were in notorious possession of the surface while the coal was being mined, that the defendant's deed contained an exception of the land occupied by the plaintiffs, and that no inquiry had been made of plaintiffs as to what their rights or claims were. This was sufficient to require the submission to the jury of the question whether the trespass had been willful. "While mere negligence that is synonymous with inadvertence is insufficient alone to sustain a finding of a willful trespass or taking, one may be so far negligent as to justify the inference that he acted knowingly and intentionally and to warrant a jury in finding that his act was reckless or willful. An intentional or reckless omission to ascertain the rights or the boundaries of the land of his victim for the purpose of maintaining ignorance regarding them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit the recovery of damages against him to the lower measure as is an intentional or willful trespass or taking."

Alabama.

Iry Coal & Coke Co. v. Alabama Coal & Coke Co., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46 (1902). Where one trespasses on a coal mine, although inadvertently and in good faith, and mines and converts coal therein to his own use, but neither willfully nor intentionally as a trespasser, the owner of the mine is entitled to recover as damages in an action of trover the value of the coal as it lay in the mine after it had been cut or "knocked down" by the defendant, and thereby severed from the realty. The contention of the defendant that the damages should be measured by the value of the coal in and as a part of the realty, and that the recovery should be for the difference in the value of the land before and after the coal was removed, is not approved.

Mabel Min. Co. v. Pearson Coal & Iron Co., 121 Ala. 567, 25 So. 754 (1899). See this case under chap. XXIII, div. II.

California.

Ophir Silver Min. Co. v. Superior Court of San Francisco, 147 Cal. 467, 82 Pac. 70, 3 A. & E. Ann. Cas. 340 (1905). The owner of land, if he chooses to waive all claim for damages to the freehold, may maintain a personal action for the value of timber or ores removed from the land by a naked trespasser, and the mere fact that in such action he may be compelled to allege or prove ownership of the land from which the timber is cut or the ore extracted does not make the action local. But where the whole or any part of the damages claimed is for injury to the freehold, the action is local and not transitory. With respect to territorial jurisdiction, there can be no difference between a suit in equity to restrain future trespasses upon real property and an action at law for past trespasses upon the same.

A suit for damages for trespass upon a vein by mining upon the dip thereof upon ground in the possession of defendant, and asking for an injunction against further mining, is local, and cannot be brought in California when the mine is in Nevada.

There can be no recovery of wood or ore or of its value in an action of trover, when it has been taken from land in possession of the defendant under claim and color of title asserted in good faith. The title to everything within the surface lines of a mining claim to the center of the earth is prima facie in the patentee, if a patented claim, or if unpatented, in any qualified locator in actual possession and engaged in mining thereon; and his claim of ownership of any body of ore within his lines as against the owner of another surface claim must, when asserted, be presumed to be a claim in good faith. In such a case, the question of title is not incidental but fundamental, and it cannot be litigated in a personal and transitory action.

Daggett v. Yreka Min. & Mill. Co., 149 Cal. 357, 86 Pac. 968 (1906). The burden is upon the plaintiff to establish the identity of the vein, which it is alleged has been trespassed upon, with that having its apex in his claim.

Colorado.

St. Clair v. Cash Gold Min. & Mill. Co., 9 Colo. App. 235, 47 Pac. 416 (1897). In the measure of damages for trespass for taking ore from the property of another there are two classes. "In both of them the burden of proof is with the defendant to show what he did, the value of what he took, and thereby limit the recovery. * * * It has been settled that a recovery on an innocent trespass is based on a totally different rule from one which is not the result of an honest mistake and is, therefore, a willfull trespass, within the ordinary legal acceptance of this term. In the first class of cases the defendants are undoubtedly compelled to pay only the value of the ore as it was in the mine and therefore they can limit the recovery, first, by the value of what is taken; second, by the cost of mining and extraction, trimming and hoisting to the surface, or delivering it at the pit's mouth.

This is the value of the stuff to the plaintiff, who would be compelled to stand these expenses if he had mined the ore himself. In this statement there has been no mention of the cost of reduction, for while this is usually a legitimate item of deduction, it is unimportant to the present discussion. On the other hand, if the defendants have taken out the ore not as the result of an honest mistake or an honest intention, but under circumstances which showed that they had knowledge of the situation or the circumstances were such as to legally charge them with this knowledge, they are entitled to no such deduction, and they may not reduce the amount of the recovery by proving the cost of mining."

The cost of mining is the cost of digging the ore out of the vein and does not include the expense of running levels, drifts, etc., to reach the vein.

It is the defendants' duty to ascertain where they are working, and the burden is on them to show that they acted in good faith and on fairly well founded belief of what they claimed were their rights.

If the defendants have mingled the ore taken from plaintiff's vein with their own ore so that plaintiff cannot separate, distinguish and estimate it, the burden is on the defendants to prove the amount which was taken from plaintiff's vein. Unless they can satisfy the jury on this point, plaintiff may recover the value of all the ore shown to have been taken out. (To the contrary is *Maloney v. King*, 30 Mont. 158, 76 Pac. 4, below.) To throw light on this question defendants may show what work was done by them on plaintiff's vein, what ore was taken out and the extent and value of the ore which came from their own vein. But though this evidence is uncontradicted, the court must not take the question of damages from the jury, to whom this evidence should be submitted with instructions that it is only to be considered in determining what ore was taken from plaintiff's vein.

United Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045 (1897). Where coal is removed by willful trespassers, the measure of damages is the full value of the coal mined without deduction for labor and expense of mining, the value of the ore at the time and place it is severed from the realty. In this case that value was arrived at by taking the value at the collar of the shaft and deducting the cost of transporting the coal to that point from the point where it was mined.

Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283 (1897). In an action for trespass in taking ore from plaintiff's land, plaintiff showed that a location certificate was filed in 1880 by M. and then testified that he purchased from L. in 1885 and went into and remained in possession until action brought in 1894, that he worked the claim and filed amended location certificates in 1890 and 1891. The defendant did not claim any title to the land. Notwithstanding failure to produce written conveyances, this was sufficient to show a valid location in the actual and lawful possession of plaintiff which prima facie at least entitled him to maintain this action.

In trespass by the owner of a mining claim against the owner of an adjoining claim for mining and removing ore from plaintiff's claim, the presumption is that ore within the boundaries of plaintiff's claim belongs to

him, and the burden of proving that the ore was taken from a vein whose apex was within the lines of defendant's claim is on the defendant.

Montroza Gold Min. Co. v. Thatcher, 19 Colo. App. 371, 75 Pac. 595 (1904). See this case on page 207.

Orphan Belle Min. & Mill. Co. v. Pinto Min. Co., 35 Colo. 564, 85 Pac. 323 (1906). It is the duty of the lessee of mining property to determine the location of the underground lines of the leased premises. That duty is imposed by the law upon the one who mines the property. It is not within the scope of the general authority of a manager of a mining corporation to request the lessee of his corporation to commit a trespass, so as to make it the act of the corporation.

Illinois.

Donoran v. Consolidated Coal Co. of St. Louis, 88 Ill. App. 589 (1899), affirmed 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206 (1900). Defendant owned and was in possession of the surface of a tract of land containing 159½ acres, but the coal under the surface of 135 acres of this tract belonged to the plaintiff. The defendant, forgetting that plaintiff had this estate, leased the entire tract to a third person for mining purposes, reserving a royalty on the coal mined, as rent. Held that defendant was liable as a trespasser for the coal mined from under the 135 acres of which he owned only the surface, his grant of the entire tract for the purpose of mining for his own benefit and for that of the lessees putting him in the position of one who "requests or aids and abets the trespass." The proper measure of damages was the value of the coal at the mouth of the pit, less the cost of carrying it there from the place where it was dug, allowing nothing for digging, this being the rule where the trespass arises through mistake or inadvertence.

Smoot v. Consolidated Coal Co. of St. Louis, 114 Ill. App. 512 (1904). See this case on page 39.

McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 N. E. 174 (1908). Where a mining company has wrongfully and knowingly mined coal beyond the limits of the mine, it is proper to enjoin the further removal of the coal, and also to restrain the company from entering and using the entries in complainants' coal for any purpose.

The measure of damages for coal wrongfully mined is the value of the coal at the mouth of the pit, less the cost of conveying it there from the place where mined. The only deduction from the value of the coal at the mouth of the pit to which the wrongdoers are entitled is the amount paid for loading and hauling it to the foot of the shaft, hoisting and dumping it into the car at the top. As between the wrongdoer and the owner of the coal, the general expenses of operation of the mine do not enter into the question. As between them such expenses must be charged to mining and not to transportation.

Indiana.

Sunnyside Coal & Coke Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46 (1896). In an action of trespass for mining on land of plaintiff, it was not error to charge the jury to the effect that, if the trespass was committed by mistake or unintentionally, the measure of damages would be the value of the coal taken at its market value in the vein, or before severing it from the soil, together with such other damages to the real estate flowing from such trespass; but if the trespass was willfully and intentionally committed, the measure of damages would be the value of the coal converted at the place where it lay after it had been mined, allowing nothing for severing the same.

Lotz, J.: "While the coal lay in the vein, it was a part of the realty; when it became severed, it became a chattel. The change in its condition did not change its ownership, it still belonged to the owner of the soil. He was entitled to recover its possession, and if this could not be done he was entitled to recover its value as a chattel. If a trespass is willful and intentional, the law will not permit the trespasser to profit by his own wrong. Whatever labor the trespasser voluntarily bestows upon property under such circumstances he must lose. If a trespass is the result of a mistake the damages may be reduced by the value of the labor expended upon it. The one is a positive aggressive wrong, the other a mere inadvertence."

"Whatever the rule may be elsewhere. It is settled in this State, that in an inadvertent or unintentional trespass upon lands, the damages should be measured by the permanent injury done, plus the value of the product severed immediately after the severance, less the cost of labor expended upon them; the burden being on the defendant to show such cost. If the trespass be intentionally committed, the damages should be measured by the permanent injury done plus the value of the products severed at the time of their conversion, or their highest market price at any time between the severance and the conversion; and the trespasser is not entitled to any reduction on account of the labor expended on such products."

A trespass is inadvertent where there was no intention to enter upon the particular land in question; but not when there was an intention to enter upon that land through a mistake as to the legal rights of the trespasser.

Iowa.

Mier v. Phillips Fuel Co., 130 Iowa, 570, 107 N. W. 621 (1906). In an action for damages to land caused by removal of coal, evidence that coal was discovered in land adjoining that of plaintiff, which contained fissures in the surface similar to those in plaintiff's land, is admissible on the question as to whether plaintiff's land contained coal, but evidence as to removal of coal from the adjoining land is irrelevant. Evidence tending to show that defendant had mined coal on land adjoining that of plaintiff's is not competent on the question of whether he had actually taken it from plaintiff's land where there was no showing that the entries extended

through plaintiff's land to that adjoining. The thickness of a vein of coal under one tract of land is not competent to show its presence under a neighboring tract where the conditions are shown to be variable in that vicinity.

Kentucky.

Sandy River Cannel Coal Co. v. White House Cannel Coal Co., 30 Ky. Law R. 1308, 101 S. W. 319 (1907). In action of trespass for unlawfully working a mine and extracting coal or ore therefrom, if the taking was not a willful trespass, but was the result of an honest mistake as to the true ownership of the mine, the measure of damages is the value of the coal or ore as it was in the mine before it was disturbed. But where the trespass is willful and not the result of an honest mistake, the measure of damages is the value of the coal or ore after being removed from the mine.

Montana.

Maloney v. King, 30 Mont. 158, 76 Pac. 4 (1904). In an action for the recovery of the value of ore mined and carried away from a vein claimed by the plaintiffs, it is incumbent in the first instance upon the plaintiffs to show at least prima facie the amount of ore taken by the defendants, and the plaintiffs cannot recover more than the value of that amount of ore. If the defendants claim that some of this ore was extracted from other ground not belonging to the plaintiffs, this is a matter of defense which it is for the defendants to prove. An instruction is erroneous which tells the jury, in effect, that if the defendants took some ore which belonged to them, and some which belonged to the plaintiffs, and mixed the same, the plaintiffs could recover the value of the whole, unless defendants separated the same by testimony, and proved the amount which rightfully belonged to each. (This is opposed to *St. Clair v. Cash Gold Min. & Mill. Co.*, 9 Colo. App. 235, 47 Pac. 466, above.)

Oregon.

Hall v. Abraham, 44 Or. 477, 75 Pac. 882 (1904). "Where a party is suing for damages to his mine, and the defendant is a trespasser through inadvertence, he would be compelled to pay only the value of the ore as it was in the mine, and would be entitled to limit his recovery, first, by the value of what is taken; and second, by the cost of mining and extraction, tramping and hoisting to the surface, or hoisting to the pit's mouth, which would be the value of the ore to the party suing if he were engaged in mining himself, and compelled to stand the expense of producing it. This should be confined to the actual cost of digging or quarrying the particular ore from the particular vein in which it is found, exclusive of the work of running levels, drifts, cross-cuts, or explorations, development, or improvement, in discovering or reaching the vein."

Pennsylvania.

Gotshall v. Langdon, 16 Pa. Super. Ct. 158 (1901). Plaintiff by contract of sale acquired equitable title and went into possession in 1885, and acquired legal title in 1891. She could maintain trespass for mining on the land between 1885 and 1891.

In trespass for mining on plaintiff's land, the statute of limitations begins to run from the time of actual discovery or when discovery was reasonably possible.

Ruttledge v. Kress, 17 Pa. Super. Ct. 490 (1901). The act of May 8, 1876, imposing treble damages upon any person who shall mine or dig out any coal, iron, or other minerals, knowing the same to be upon the lands of another, without the consent of the owner, applies to quarrying building stone.

Crawford v. Forest Oil Co., 208 Pa. 5, 57 Atl. 47 (1904). Plaintiffs' ancestor granted to defendant's assignor the exclusive right to operate for oil and gas on a certain farm. Plaintiffs, contending that the grantor had only a life estate, brought ejectment for the farm and recovered. They then brought this action of trespass for the illegal taking of oil by the defendant after the death of the grantor. This was held to be a proper remedy. Before the Procedure Act of 1887, the wrongful taking of oil by one person from the land of another and appropriating the same to his use would, according to the facts, support an action of trover, an action of trespass de bonis asportatis, of trespass quare clausum fregit, or of trespass for mesne profits. Under the Procedure Act of 1887 these are all actions of trespass.

The defendant having taken the oil under a claim of right which turned wholly on a question of law, and having been honestly mistaken, the measure of damages is the value of the oil taken in the pipe lines less the expense of putting it there, which expense would include labor and necessary improvements and repairs to the fixtures and appliances used in doing this, with such additional sum as would compensate the plaintiffs for the detention of the oil, or for the delay in not receiving the damages that they were entitled to receive, this sum not to exceed legal interest on the various sums received by the defendant company for the oil which it wrongfully took and sold.

The court declined to limit the plaintiff's recovery to the usual royalty of one-eighth of the product; and on the other hand declined to charge the defendant for oil drained through wells on adjoining lands or for neglect in not drilling more wells and preventing plaintiffs from drilling other wells on the farm.

Hendler v. Lehigh Val. R. Co., 209 Pa. 263, 58 Atl. 488 (1904). A railroad company cannot be charged with double or treble damages under the act of May 8, 1876, for taking common mixed sand for grading and construction purposes from land over which it has the right of way. Such sand is not a mineral within the terms of the act, which being highly penal is to be construed strictly.

Reilly v. Crown Petroleum Co. 213 Pa. 595, 63 Atl. 253 (1906). Plaintiff having recovered land in ejectment against defendant, the proper remedy to recover the value of oil taken from the land by the latter while in possession is trespass for mesne profits. Assumpsit will not lie.

Utah.

Red Wing Gold Min. Co. v. Clays, 30 Utah, 242, 83 Pac. 219 (1906). In an action to recover for the removal of ore from beneath the surface of plaintiff's mining claim, the defendant alleged that the ore was taken from a vein which apexed on his claim. The burden was upon him to establish the location and apex of his vein.

Bullion Bock & Champion Min. Co. v. Eureka Hill Min. Co., 103 Pac. 881 (1909). Section 2877, Comp. Laws 1907, prescribing the limitation of actions for trespass, provides "that when the waste or trespass is committed by means of underground workings upon any mining claim, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the acts concerning such waste or trespass." This proviso applied where it was found as a fact that plaintiff had no knowledge, information or notice of any fact or circumstance to lead it to investigate or inquire whether a trespass had been committed, and that plaintiff did not discover the facts constituting the trespass, or any fact to lead it to suspect a trespass, until a date which was within the limitation.

CHAPTER XXIII.

EQUITABLE PRINCIPLES AND REMEDIES IN THEIR APPLICATION TO MINES.

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| I. Fraud. | III. Receivers. |
| II. Injunction. | IV. Inspection. |

I. FRAUD.

p. 705.

United States.

Green v. Turner, 30 C. C. A. 427, 86 Fed. 837 (1898). 7th Circ. Prospective purchasers of mining land "went over the property and at various places saw pits and trenches, some old and some new, at the bottoms of which they were told that extensive beds of ore in place had been found. Those statements they had the right to believe without going into the pits to determine the truth by dipping out the water or digging through the earth with which they were partly filled. The mere presence of the pits and trenches, besides demonstrating the scope of the exploration which seemed and was represented to have been made, was calculated to add creditably to the representations made of what had been discovered, and the inference is not unfair that that was the intended result."

Mather v. Barnes, 146 Fed. 1000 (1906). C. C. W. D. Pa. During the negotiations for the sale of coal lands, the sellers represented that the land was underlaid throughout its entire extent with a particular vein of coking coal, for which the buyer was seeking. The sellers themselves had not been over the land and were not acquainted with it, and they so stated. The buyer sent experts to examine the land, which was wild, mountainous and in places impassable, and could not be explored by them without a guide. They were referred by the sellers to a man employed by them to show the property, stating that he was thoroughly acquainted with it and was their representative on the ground. He made statements to the experts in regard to the coal deposits which he knew to be false, and concealed from them important openings and indications which would have revealed the truth, but which they could not have found without assistance. The sellers were held to be responsible for the fraud of their agent, and the purchase having been induced thereby, the buyer was entitled to have the contract set aside.

Oddert v. Marquet, 163 Fed. 892 (1908). C. C. N. D. W. Va. The purchaser of the entire capital stock of a corporation, which owned the coal under certain land, alleged that he had been induced to purchase by fraudulent misrepresentations of the seller that there was but one "horse-back" or fault on the property, when in fact the vein was broken and intermixed with very many clay veins, faults or horse-backs. There being no way of determining either from an examination of the surface, or from an examination of the mine, where the coal had been worked out, when these faults might appear in the coal not yet mined, it was held that the representation could only be based upon opinion and desire, by which plaintiff could not in the nature of things be deceived or misled.

It was also charged that the seller had represented that the coal underlying the land was continuous, and underlaid all of the land and that the vein was four feet thick. "It has been uniformly held that equity will abate the purchase price for a tract of land which has fallen short in acreage where the contract is a sale by the acre." And in the case of a sale of coal supposed to be under lands, which turned out to have none of merchantable quality under them, there is a failure of consideration and the buyer may recover back the purchase money. "In this case no direct sale of the coal was made, but I am constrained to believe that the stock of this company was purchased solely in consideration of the coal supposed to underlie the two tracts of 192 and 40 acres, and that the vein so underlying these tracts was assumed to be continuous and of at least four feet in thickness; that Marquet knew or could have known, of the shaft sunk on a part of the land showing that it did not exceed three feet three inches. He was using this shaft as a well to supply water, and before making representations as to the thickness of the vein, he could have easily ascertained by proper investigation the fact. There can be no question but a difference of nine inches in a thin vein of four feet over any considerable part of the territory would very greatly diminish the value of the property both because of the loss of coal and because of the increased expense incurred in mining the residue. Taking the general estimate of 1,000 tons for every foot thick per acre, it will be seen that these nine inches would represent some 750 tons loss to each acre so deficient. There is nothing in the evidence to disclose the increased cost of mining the residue. I am inclined to believe that, upon a reference, these facts can be fairly ascertained and that plaintiffs are entitled to claim * * * for the lack of coal and reasonable increased cost for mining."

Arizona.

Mitchell Min. Co. v. Hammons, 100 Pac. 795 (1909). A purchaser of mining claims cannot have his contract rescinded on the ground of the vendor's false representations, where the deal was not closed until after investigation by the purchaser's agents, for there was an opportunity in such case to learn all the facts before closing.

Kansas.

Basye v. Paola Refining Co., 79 Kan. 755, 101 Pac. 658, 131 Am. St. Rep. 746 (1909). An action to rescind the purchase of an oil and gas lease on the ground of fraud, consisting of representations as to the quantity of oil produced, is not necessarily defeated by the fact that the purchaser had used a quantity of the oil from the property before rescinding. Although he cannot place the vendor in statu quo by restoring the oil in specie, the latter can be granted relief upon the payment of its value and substantial justice will thereby be done.

Ohio.

Jones v. Draper, 26 Ohio C. C. R. 785 (1903). Plaintiffs were induced by defendant's agent, whom they supposed to be their agent, to purchase oil property at a grossly exaggerated valuation, upon material misrepresentations which they believed to be true and relied upon. In an action to recover moneys paid, held that where an inspection of the property by a prospective purchaser is prevented or its completeness defeated by the acts, words or arts of the seller, the prospective purchaser is justified in relying upon the seller's representations, and if they are false he is entitled to recover what he paid.

West Virginia.

Bruner v. Miller, 59 W. Va. 36, 52 S. E. 995 (1906). A misrepresentation concerning the subject-matter of a contract, and especially a contract relating to land, though innocently made, as a result of lack of knowledge, amounts in law to fraud, not actual, but constructive, legal fraud, and gives as complete a right of rescission as if it were actual fraud, subject, however, to the limitation or qualification that the representation must relate to some matter or thing which is of the very essence or substance of the contract. In an oil lease, both quantity and location are material, and a gross misrepresentation as to either, relied upon by the lessee and believed to be true, is ground for rescission of the contract. The court will in such case put the parties in statu quo, requiring each to restore to the other what was acquired by the contract, including moneys paid for delay in drilling, etc.

II. INJUNCTION.

p. 716.

United States.

Erskine v. Forest Oil Co., 80 Fed. 583 (1895). C. C. W. D. Pa. Where the complainant claims under a legal title and is out of possession, equity is without jurisdiction to enjoin one in possession from taking oil. The

respondent here claimed under a lease derived from the father of complainant, who, so complainant contended, had only a life estate.

"While the bill does not, in words, pray to acquire possession of the wells, yet in substance and effect that is its purpose. It seeks to restrain respondent from operating the wells or taking the oil and these acts are, where oil and gas are concerned, the essential attributes of possession."

"A bill, then, which in substance would deprive one in possession of every thing which constitutes possession, whatever it is in name, is in fact one to divest possession, or what is known as an ejectment bill."

"Nor is the taking of the oil from the wells under the facts of this case to be adjudged such an irreparable injury as in some cases might warrant the interference of a court of equity by injunction. The respondent is concededly solvent and the proofs tend to show that by the taking out of the oil on this tract it is prevented from being drawn away and taken out by other wells on adjoining lands. Moreover, in pending actions of ejectment the Pennsylvania statutes provide, by writ of estrepement, for all protection of land in litigation from spoliation."

Waterloo Min. Co. v. Doe, 27 C. C. A. 50, 82 Fed. 45 (1897). 9th Circ. This was a bill in equity to restrain a continuing trespass. After quoting *Erhardt v. Board* (see Vol. 1, p. 722), Knowles, D. J., stated the rule thus: "Where there is no dispute as to title, there would seem to be no necessity of resorting to an action at law for the purpose of determining the same. But when there is a dispute as to the legal title, it would seem that the best rule was to require an action at law to settle the legal title. This was so stated in the case of *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 58 Fed. 129. Pending this action, however, an injunction pendente lite would be proper. When the legal title is settled, if the equitable rights such as would warrant a perpetual injunction should be found for complainants then such an injunction should be awarded."

If, however, the objection that the legal title has not been determined is not raised in the court below, it cannot be raised on appeal. It will be held to have been waived.

Union Mill & Min. Co. v. Warren, 82 Fed. 522 (1897). C. C. D. Nev. A threatened trespass will be enjoined where it would do irreparable injury and tend to destroy the substance of the property. It is not necessary that there be some overt act committed towards the invasion or destruction of the complainants' rights, independent of threats by word of mouth.

Silver Peak Mines v. Hanchett, 93 Fed. 76 (1899). C. C. D. Nev. Pending an action to recover possession of mining property, defendant was enjoined from operating the mine. Complainant subsequently did some work on a tunnel for the purpose of performing the annual work and kept a watchman on the premises to avoid forfeiting the insurance policies thereon. This was held not to be within the rule forbidding a complainant from doing acts which at his instance defendant had been restrained from doing, but to be within the rule that such an injunction does not prevent any party having an interest in the property from doing whatever is reasonably

necessary for its preservation. The court consequently refused to dissolve the injunction.

Dimick v. Shaw, 36 C. C. A. 347, 94 Fed. 266 (1899). 8th Circ. Pending litigation over the title to certain mining property, the plaintiff gave to defendants permission to enter into possession of the property for the purpose of prospecting. That litigation resulted in favor of the plaintiff (*Shaw v. Kellogg*, 170 U. S. 312, 42 Law. Ed. 1050), who then notified the defendants to quit, which they refused to do. Held, equity has jurisdiction to enjoin defendants from working the mine and removing ore. The remedy at law is inadequate.

Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co., 61 C. C. A. 359, 126 Fed. 623 (1903). 6th Circ. Although a lessor of oil and gas lands may not bring a bill to quiet title when he is not in possession of the premises, he may apply for an injunction to restrain waste and threatened trespasses, and the court may entertain a bill for that purpose, even though the plaintiff be not in possession, and having thus acquired jurisdiction, it may also proceed to settle the question of title and remove the cloud thereon.

Big Six Development Co. v. Mitchell, 70 C. C. A. 569, 138 Fed. 279, 1 L. R. A. (N. S.) 332 (1905). 8th Circ. The lessor in a mining lease, alleging a forfeiture thereof, filed a bill against the lessee to cancel the lease as a cloud on the title, to establish his own right of possession, and enjoin the lessee from mining ore from the premises. It was held that this might be sustained as an injunction bill to restrain trespass. "The trespass here complained of, as disclosed by the record, is not an ordinary case of trespass upon lands, of temporary duration, but, as we think the evidence shows, was a continuous trespass, which threatened to destroy the character of the property as a mine, and would render the plaintiff's interest therein valueless. Threatened and continuous injuries to mines, quarries, timber growing upon lands, buildings located thereon, or other improvements of a permanent character, are enjoined, because, as has been said, such acts 'alter the character of the property, and also tend to destroy it, and occasion irreparable loss and damage.' In such cases the threatened injuries are to the res, and diminish the value of the property itself, and an injunction will be granted to prevent the continuing waste, or continuing trespass, although the plaintiff is not in possession, and although the legal title has not been settled or questioned by an action at law."

Waskey v. McNaught, 90 C. C. A. 289, 163 Fed. 929 (1908). 9th Circ. By the Code of Civil Procedure of Alaska, the distinction between actions at law and suits in equity is abolished; and it is provided (§ 386) that an injunction may be allowed at any time after the commencement of an action and before judgment "(2) when it appears by affidavit that the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights concerning the subject of the action, and tending to render the judgment ineffectual." In ejectment to recover certain placer mining ground, the plaintiffs are entitled, under the code, to an injunction to restrain the defendants from

mining pendente lite, where it appears that the value of the ground consisted in the gold-bearing earth, sand and gravel contained therein, and would be destroyed by its removal. Such an injunction would not restrain the working of material which had been taken from the land in dispute, but removed to other property. But sand and gravel which have been taken from the lower part of the mine and are deposited on the surface are still part of the realty and are covered by the injunction.

Montana Min. Co. v. St. Louis Min. & Mill. Co., 93 C. C. A. 536, 168 Fed. 514 (1909). 9th Circ. Code Civ. Proc. Mont. 1895 (Rev. Codes, § 6643) provides: "When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunctive order may be granted to restrain the removal or disposition." A suit was pending in which plaintiff claimed large damages for ore extracted from a vein owned by the plaintiff, and the decision in former litigation between the parties (see 204 U. S. 204, page 505, above) foreshadowed a recovery by the plaintiff. The defendant was enjoined from mining and selling ore from its own mine, where it appeared that if it continued to do so, there would not remain therein sufficient ore to satisfy such judgment as the plaintiff might recover.

Alabama.

Mabel Min. Co. v. Pearson Coal & Iron Co., 121 Ala. 567, 25 So. 754 (1899). An injunction will lie to restrain an adjacent mine owner from trespassing on the complainant's lands and mining and taking coal therefrom, and from throwing the water from defendant's mines in and upon the mineral lands of complainant, thereby rendering the same valueless, so that the complainant would suffer irreparable injury unless the defendant be restrained. "In cases of this character the question of the solvency or insolvency of the defendant is immaterial. 'In trespasses to mining property greater latitude is allowed courts of equity than in restraining ordinary trespasses to realty, since the injury goes to the immediate destruction of the minerals, which constitute the chief value of this species of property. Where, therefore, the trespass consists in the removal of ore from the complainants' mines, the legal title being clearly established in complainants, they are entitled to an injunction, even though an action at law would lie.' High, Inj. Sec. 730; *Chambers v. Iron Co.*, 67 Ala. 353."

Alaska.

Binswanger v. Henninger, 1 Alaska, 509 (1902). A cotenant in possession, who either works in so unskillful a manner as to amount to destructive waste, or, being in possession under an unequivocal hostile assertion of exclusive title, seeks to appropriate the entire product to his own use will be enjoined at the suit of an injured cotenant.

California.

Williams v. Long, 129 Cal. 229, 61 Pac. 1087 (1900). Where a purchaser in possession of a mine makes default in the payment of an instalment of the purchase money, and the vendor claims that the agreement provided that the land should in such event revert to him, a temporary injunction will be granted restraining the extraction and removal of ore from the mine and the commission of waste, but not the mere "working" thereon.

Idaho.

Safford v. Flemming, 13 Idaho, 271, 89 Pac. 827 (1907). The court will grant an injunction pendente lite restraining defendants, their agents or employes, from interfering with plaintiffs, their agents and employes, in their working of a mining claim where an action has been brought to determine property rights therein, and plaintiffs have set forth that defendants have threatened to use violence to plaintiffs if they undertook to continue the work. "It has been the practice of the courts in mining cases to be liberal in granting injunctive relief in mining litigation, in order that one party may not be placed in a worse position during the litigation." "The injunction to be granted should not prevent either party from doing whatever was reasonably necessary for the preservation of the property in controversy. The purpose of such injunction is to protect the rights of the parties until the final determination of the case."

Illinois.

Rice v. Looney, 81 Ill. App. 537 (1898). On a bill to enjoin defendant from taking coal from beneath land owned by the plaintiff, the latter claimed that the defendant was only a tenant under an agricultural lease, but the former claimed the right to take the coal under an agreement with the plaintiff's ancestor. The court said that if the plaintiff's contention was to prevail, the defendant was a mere trespasser and that there was an adequate remedy at law, there being no proof of insolvency.

Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335 (1904). See this case on page 627.

McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 N. E. 174 (1908). Where an owner of a mine had wrongfully and knowingly mined coal beyond the limits of his mine, he may at the suit of the adjoining owner be enjoined from further removal of the coal, and also from entering and using the entries in complainant's land for any purpose. See this case also on page 651.

Indiana.

Simpson v. Pittsburg Plate Glass Co., 28 Ind. App. 343, 62 N. E. 758 (1902). Where a gas lease provides that the lessee shall furnish gas to the lessor for domestic uses, and subsequently the lessor threatens to cut

off the supply of gas in violation of this covenant, although the supply of gas is sufficient to carry out the agreement, the lessor is entitled to an injunction in equity to restrain him from so doing.

American Steel & Wire Co. v. Tate, 33 Ind. App. 504, 71 N. E. 189 (1904). Where a contract confers upon the grantee the "exclusive right of gas or oil wells and products therefrom" on a certain tract of land, and the landowner binds himself, his heirs and assigns, not to lease any of that tract to any other party or parties for gas and oil privileges during the life of the contract, the invasion of the tract by a stranger, and the threatened drilling of a well by him for the purpose of extracting gas or oil without the consent of the grantee under the contract, the damages that would accrue being incapable of definite ascertainment, constitute ground for an injunction at the instance of the grantee, whether the latter had or had not entered upon the land and proceeded to drill a well or take gas or oil therefrom.

Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020 (1903). "In *Manufacturers Gas & Oil Co. v. Indiana Nat. Gas & Oil Co.*, 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768, recognition was given to the doctrine, as natural gas can be obtained only by the drilling of wells, that the surface proprietors have such a qualified property in the gas in limited reservoir below that they may enjoin an act which is in its nature destructive of their interests in the common property; but we are not prepared to affirm that, because of the right of a proprietor to draw gas from the common reservoir, he could enjoin a third person from obtaining gas therefrom for the mere reason that the latter did not have a right to drill the necessary well. For such a violation of law it appears that the wrongdoer's accountability is only to the proprietor who has a standing to complain of the trespass involved in the drilling of the well. It follows from this consideration that the plaintiff below could not enjoin the putting down of the well, unless it further appears that said plaintiff had a proprietary right in the land." A lessee of land for oil and gas purposes, over which a railroad company has an easement or right of way, has such a proprietary right that he may enjoin the drilling of a gas well on the land covered by the easement.

Richmond Nat. Gas Co. v. Davenport, 37 Ind. App. 25, 76 N. E. 525 (1905). Injunction will lie to restrain a tenant for life from committing waste by operating for oil or gas. See this case on page 6.

Iowa.

Halpin v. McCune, 107 Iowa, 494, 78 N. W. 210 (1899). A person who mines upon another's land will be enjoined in equity from so doing, the trespass being of a continuous character. The mine owner is not obliged to sit idly by and see his property carried away day by day, with only a right to sue from time to time for the value of such as he can identify.

Michigan.

Negaunee Iron Co. v. Iron Cliffs Co., 134 Mich. 264, 96 N. W. 468 (1903). Where the complainant is in possession of mining property, and the defendants threaten to enter under a claim of title and remove ore, equity will grant an injunction to restrain them from so doing, the injury threatened being irreparable.

Missouri.

Chicago & Alton R. Co. v. Brandau, 81 Mo. App. 1 (1899). See this case on page 629.

Jack Harvard Zinc & Min. Co. v. Continental Zinc & Lead Min. & Smelting Co., 106 Mo. App. 66, 80 S. W. 12 (1904). See this case on page 614.
Southwest Missouri R. Co. v. Morning Hour Min. Co., 138 Mo. App. 129, 119 S. W. 982 (1909). Under Rev. St. 1899, § 3649, providing that injunction lies to prevent irreparable injury to real property, injunction lies to prevent a mine owner from persisting in a mode of mining which endangers the support of the surface, thereby endangering the safety of railroad tracks on the surface.

Montana.

Boyd v. Desrozier, 20 Mont. 444, 52 Pac. 53 (1898). In an action to recover possession of a placer mining claim, to which defendants claimed title by relocation based upon alleged failure of plaintiff to do annual work, an injunction pendente lite was granted restraining defendants from trespassing or mining upon or disturbing the soil of the claim. It was held that the granting of such an injunction was a matter of judicial discretion; that the rule that equity would not interfere where there was a controversy as to title no longer prevailed.

Heinze v. Boston & M. Consol. Copper & Silver Min. Co., 20 Mont. 528, 52 Pac. 273 (1898). Plaintiffs were owners of town lots under which defendant was conducting mining operations upon the claim that it was following the dip of a vein having its apex in defendant's claim. The question in dispute was whether the apex of this vein was in defendant's claim or whether the strike of the vein crossed the side lines of the claim and, if so, where. The court granted an injunction pendente lite restraining defendant from in any manner entering the premises or from passing through any levels, drifts, etc., made therein, or running cars, or hauling ore, etc., through the same. The court refused to modify this so as to permit the use of these drifts, etc., for the purpose of hauling ores which came from defendant's own ground.

Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 22 Mont. 159, 56 Pac. 120 (1899). Where a defendant is working within his own ground and there is but a mere "chance" that the apexes of the veins upon which he is working are in the plaintiff's ground, it is

an abuse of the discretion of the court to issue a temporary injunction restraining the defendant from the continuance of his mining.

Maloney v. King, 25 Mont. 188, 64 Pac. 351 (1901). Where there is much evidence that the apex of a vein is in defendant's claim, but some evidence to the contrary, and the court believes that the vein has not been developed far enough to show with certainty just where the apex really is, a preliminary injunction will be granted to restrain defendant from taking ore from the portion of the vein beneath the surface of plaintiff's claim.

Anaconda Copper Min. Co. v. Heinz, 27 Mont. 161, 69 Pac. 909 (1902). Where, on a hearing for a temporary injunction, it is shown that the defendants were removing ores from beneath the surface of the plaintiff's claim, the injunction should be granted unless the defendant shows that he is not a trespasser by "evidence reasonably clear and satisfactory."

Maloney v. King, 27 Mont. 428, 71 Pac. 469 (1903). In an action to determine the ownership of certain ore bodies within the planes of the boundaries of the plaintiffs' claim, the apex of the vein in which such ore bodies are found being claimed by the defendants to be within their claim, equity will not grant an injunction prayed by the defendants, pending an appeal by them from a judgment in favor of the plaintiffs, to restrain the plaintiffs from mining upon the land in dispute, when the verified answer of the plaintiffs states that only a small quantity of ore had been extracted, and that all the work being done on the disputed ground was development work and exploration necessary to enable plaintiffs to prepare for the trial of another case involving another portion of their claim.

Gemmell v. Swain, 28 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570 (1903). See this case on page 390.

Clark v. Wall, 32 Mont. 219, 79 Pac. 1052 (1905). If a licensee refuses to vacate the premises, when his license has been revoked, but continues to mine ore and is insolvent, the owner is entitled to an injunction. See this case on page 63.

New Jersey.

Beach v. Sterling Iron & Zinc Co., 54 N. J. Eq. 65, 33 Atl. 286 (1895). Where a mine owner pollutes the water of a stream in which another is entitled to water rights, the latter, when his right is established, will be entitled to an injunction. "There is no principle which will sustain a court of equity in refusing an injunction against the maintenance of an established continuing nuisance, and leaving the injured party to his remedy at law. To do so is, in effect, to permit a party to take his neighbor's land for his own use, upon terms of making such compensation as a jury shall assess. This is inadmissible. The object and office of a verdict and judgment at law is to establish the right, and give compensation for past injuries. The right being once made clear, whether by judgment at law or upon incontrovertible rules of law and well established facts, the remedy in equity by injunction to prevent future injury is a matter of right and relief cannot be refused." See this case also on page 618.

Oklahoma.

Bay v. Oklahoma Southern Gas, Oil & Min. Co., 13 Okl. 425, 73 Pac. 936 (1903). When the character of public land is in dispute, the courts may preserve the possessory rights of the legal occupants by injunction against continuous trespassing until the question as to the character of the land shall have been heard and determined by the land department. See this case also on page 251.

Oregon.

Bishop v. Baisley, 28 Or. 119, 41 Pac. 936 (1895). Where title is in dispute and plaintiff is out of possession, equity will not grant a permanent injunction against mining. The most that it will do will be to grant a temporary injunction pending a determination of the title at law. In this case not even that remedy was allowed. The proper practice under Oregon law is explained. See, also, *Hayden v. Brown*, 33 Or. 221, 53 Pac. 490 (1898).

Muldrick v. Brown, 37 Or. 185, 61 Pac. 428 (1900). Equity will enjoin a trespass upon a mine for the reason that the extraction of ores therefrom reaches to the substance and value of the estate, and goes to the destruction of the very essence thereof.

Parker v. Furlong, 37 Or. 248, 62 Pac. 490 (1900). "In case of mining property greater latitude is allowed than in an ordinary trespass, because the injury generally goes to the immediate destruction of the minerals, which constitute the chief value of the estate. But before a court of equity will interfere, even to enjoin a trespass upon a mining claim, it must appear that the trespass consists in the removal or threatened removal of the ore, or in some act going to the irreparable injury or destruction of the mine." A single, naked trespass upon real property is not sufficient to give a court of equity jurisdiction. Nor is the mere insolvency of a defendant ever sufficient reason of itself for relief by injunction.

Pennsylvania.

Greensboro Nat. Gas Co. v. Fayette County Gas Co., 200 Pa. 388, 49 Atl. 708 (1901). A complainant who is in possession of land under an oil and gas lease may maintain a bill for injunction against a continuing trespass by one who has entered and made preparations to drill for oil and gas, and such a bill should not be dismissed, the legal title of the complainant being clear and not denied by the answer.

Verdolite Co. v. Richards, 7 North. Co. Rep. 113 (1899). Where there is a threatened injury to mining rights in land, equity will enjoin a trespass thereon, pending the determination of a possessory action; it is not necessary in such case that the title must first be settled at law. Where a lessor leases the right to take "soapstone only" from the demised premises, reserving all other minerals, but the lessee in blasting removes other minerals with the soapstone, and the lessor prays an injunction to

restrain him from doing so, equity must exercise its jurisdiction so that, if possible, these reciprocal servitudes may be enjoyed, or that each may not encroach upon the other, except as a necessary incident to mining.

Miles v. Pennsylvania Coal Co., 217 Pa. 449, 66 Atl. 764, 10 A. & E. Ann. Cas. 871 (1907). See this case on page 638.

Berkey v. Berwind-White Coal Min. Co., 220 Pa. 65, 69 Atl. 329 (1908). See this case on page 640.

Virginia.

Morison v. American Ass'n, 110 Va. 71, 65 S. E. 469 (1909). Equity will enjoin the surface owner from mining and removing iron ore at the suit of the owners of the underlying minerals. The line of decisions which hold that the right to invoke the equitable jurisdiction of courts to remove clouds from the title to real estate only accrues where the holder of the legal title is in possession has no application to this case. "Iron ore that is under the surface is not susceptible of actual possession." The removal of the ore destroys the very substance of the estate and the injury is irreparable. "The court having properly taken jurisdiction to prevent the destruction of appellee's estate, it had the right to go on and do complete justice, although in doing so it had to settle the title to the iron ore which was in dispute."

Washington.

Yarwood v. Cedar Canyon Consol. Min. Co., 37 Wash. 56, 79 Pac. 483 (1905). Where one has only an inchoate right to a mine contingent on his paying a stipulated purchase price, and therefore no right of possession until he has either paid or tendered such price, he will be enjoined from extracting ore from the mine until such payment or tender is made, at the instance of the owner of the mine.

West Virginia.

Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566 (1896). H. leased land for oil purposes to W. and subsequently, on the ground that the first lease had expired, leased for the same purpose to F. W.'s assignee brought bill for an injunction to restrain operations under the second lease. The bill will lie. "The jurisdiction for this case is not claimed to rest on the right to remove cloud on title, but on irreparable injury, and that, jurisdiction being warranted on that ground, the court will go on to adjudicate on the rights of parties as it has jurisdiction for one purpose. It makes no difference, if the elements of irreparable injury be present, whether the party doing it be solvent or insolvent." The extraction of oil is irreparable injury. The legal remedy is inadequate because (1) the injury is destructive of the substance of the estate; (2) it

is incapable of estimation in money; (3) its extent cannot be computed; (4) it may be vexatiously repeated.

The preliminary injunction should only preserve the status quo. It should not affect the question of title or possession.

Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556 (1903). Where irreparable mischief is being done or threatened to real estate, going to the destruction of the substance of the estate, such as the extraction of oil and gas, and the title to the land is in dispute, the parties claiming under hostile titles, a court of equity will enjoin the trespass and preserve the property and rights of the parties, pending the determination, in a court of law, of the question of title; and this although no action at law has been instituted, if it appears from the bill that the complainant intends immediately to put the question of title in course of judicial determination and prosecute it diligently.

Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533 (1903). Where a person enters upon land without authority under a void lease, and drills thereon, and takes petroleum oil therefrom, and removes the same from the premises, and threatens to drill other wells, and to take the oil produced therefrom, a court of equity will perpetually enjoin him from all operations under said void lease, will cancel said lease, and retain the cause for all purposes, and proceed to a final determination of all the matters at issue therein, although the plaintiffs may have a remedy at law against the wrongdoer for the trespass.

III. RECEIVERS.

p. 737.

United States.

Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673 (1899). C. C. S. D. Cal. Where two parties claim title to public land of the United States under the mineral land law, and the proof shows reasonable ground for complainant's claim, the court will appoint a receiver to take possession of the land pending the litigation, to the end that the necessary annual work may be performed for the benefit of the party who may ultimately prevail, and in order to preserve the property, and prevent the extraction and disposition, pending the litigation, of the oil which the proof showed constituted the chief, if not the only, value of the land. Both parties in this case agreed that by reason of the operation of wells on adjoining lands no injunction ought in any event to issue, because such action would necessarily result in the draining of a large part of the oil from the land by those operating on the adjoining lands.

Colorado.

Hendrie & Bolthoff Mfg. Co. v. Parry, 37 Colo. 359, 86 Pac. 113 (1906). In this case a receiver was appointed by the court for a mining company

"with all the powers usual in receivership cases, and to take charge of the affairs and property of the defendant Company." The receiver worked the mine, incurring an indebtedness. Held, that under the statute providing for receiverships of mining properties, the receiver had no authority to work the mines, but could only take charge of the property for the purpose of closing out the business. Hence the indebtedness cannot be charged against the estate.

Texas.

West v. Herman, 47 Tex. Civ. App. 131, 104 S. W. 428 (1907). Where lands in which plaintiff claims to have an interest are valuable chiefly as oil lands, and there is a likelihood of his being able to establish his claim, the court may in its discretion appoint a receiver to preserve his interest in the product under Texas Rev. St. 1895, art. 1465.

IV. INSPECTION.

p. 739. In addition to the statutes cited in Vol. 1, see Alabama, Code 1907, § 7420; Indiana, 3 Burns' Ann. St. 1908, §§ 8599-8601; Iowa, Code 1897, § 2485; Kansas, Dassel's Gen. St. 1905, §§ 4304-4311; Missouri, Rev. St. 1899, §§ 8772-8774; Ohio, Bates' Ann. Rev. St. 1906, §§ 4374-4379.

United States.

Henszey v. Langdon-Henszey Coal Min. Co., 80 Fed. 178 (1897). C. C. E. D. N. C. A stockholder and bondholder of an insolvent mining company, having petitioned for the removal of a receiver on the ground of mismanagement, was permitted to have an inspection of the mine made by his agent for the purpose of ascertaining whether the grounds of his petition were all founded.

Colorado.

People v. DeFrance, 29 Colo. 309, 68 Pac. 267 (1902). Although part of § 864 of the Code of Civ. Proc. seems to permit the making of an inspection order even where no suit was pending, when construed together with the rest of the section and with other statutes of the state, as well as with the common law, the intention of the general assembly appears to have been to permit no inspection, survey or examination of a mine unless there was at the time a suit pending which made the same necessary or proper for the protection of the interests of litigants.

Montana.

State v. District Ct., 26 Mont. 396, 68 Pac. 570 (1902); *Id.*, 26 Mont. 411, 69 Pac. 103 (1902). Neither the inherent jurisdiction of equity, nor § 1317 of the Code of Civ. Proc., authorizes the issuance of an order for the inspection of premises in which the petitioner has no proprietary interest and concerning which there is no suit pending. The right which the owner of one claim may have, to follow a vein apexing on his claim, under another claim, does not constitute an interest in the latter claim. It constitutes an interest in the former claim, and a decree allowing the claimant of extralateral rights to inspect premises under which his vein was supposed to pass, but as to which there is no pending litigation, will be set aside as without jurisdiction.

State v. District Ct., 26 Mont. 416, 424, 68 Pac. 794, 946 (1902). A petition for an order of supervisory control directed to a lower court, and requiring it to vacate an order permitting a defendant to inspect complainant's mine workings, will not be granted where the petitioner had filed a bill asking that the defendant, an adjoining owner, be restrained from mining under the petitioner's land, and the former had filed its petition stating that there was a dispute as to whether the apex of the vein from which it had been taking ore was in its land or in complainant's land, that it was only possible to determine this question by observing how the vein developed, and that the complainant had excluded him from the only places where this development could be watched. The order sustained provided for one general inspection and for subsequent inspections from time to time as the operations progressed during the pendency of the action, but the supreme court limited the permitted inspection to an inspection of those veins only the locations of whose apexes were in dispute between complainant and defendant.

State v. District Ct., 26 Mont. 483, 68 Pac. 861 (1902). An order will not be made directing a lower court to vacate an order permitting the plaintiff in a trespass suit to inspect the workings of the defendant, where the plaintiff has sufficient evidence to warrant an honest belief that his rights are being invaded, but the means of ascertaining with certainty the actual conditions are in the exclusive control of the defendant.

State v. District Ct., 28 Mont. 528, 73 Pac. 230 (1903). The statute permitting the making of an inspection order is not in contravention of the constitution either of the United States or of Montana, for it neither deprives an owner of property without due process of law, nor does it amount to a taking or damaging of private property without just compensation first made to the owner thereof. The owner of a claim on which a vein apexes may have an order for the inspection of the workings of other claims under which he alleges that the vein dips. "The exterior portions of a lode * * * are substantial parts of the property conveyed by the patent, and if a stranger, under claim of title, encroaches upon such portions by means of openings of which he has exclusive control, the statute furnishes the owner the means of ascertaining the facts necessary to enable him to protect his rights, and authorizes entry for

that purpose through the property of his adversary. It authorizes also a survey of the tunnels, shafts and drifts therein for the purpose of the action. If the survey and inspection must be limited with absolute certainty to the openings made upon the lode itself * * * the purpose of the statute would be defeated. * * * The extent of the inspection and survey must be limited only by the necessities of the action as they are made to appear."

In order to warrant a court in granting an order for an inspection, the motion therefor need not allege nor the evidence in support thereof establish in exactness and detail facts to discover which is the object of the inspection asked for; it need be alleged and proven only that an action is pending involving title to real estate and that there is good cause to believe that an examination of the property will aid the parties to present their rights in the proper way, and the court intelligently to adjust them. The order for the inspection should include only such parts of defendant's claims as are so near to the supposed position of the vein claimed by the plaintiff that their inspection reasonably could be supposed to be of help to the plaintiff. Where the plaintiff asserts that his vein comes into defendant's claims at certain levels only, the order should not give the right to inspect defendant's workings at higher levels. It should not require the defendant to give the plaintiff access thereto through the defendant's shaft and by means of his appliances, where it is practicable for the plaintiff to obtain access through his own shafts and by means of his own appliances. Under § 1317, Code Civ. Proc., requiring an applicant for an inspection order to pay the expenses of the inspection, the court in directing the defendant to raise and lower the applicant's agents should provide for payment by the applicant for such services.

State v. District Ct., 29 Mont. 105, 74 Pac. 132 (1903), affirming 26 Mont. 416, 424, 68 Pac. 794, 946, above. Where the only means of access to the workings in controversy is the shaft of the plaintiffs, the court is justified, in an order for inspection, in compelling the plaintiffs to allow defendants ingress into and egress from the mine by means of plaintiffs' machinery and appliances. Such temporary invasion of the property rights of a party to an action is not a taking or damaging of property within the purview of the constitutional prohibition.

An order for inspection should provide for the compensation contemplated by § 1317, Code Civ. Proc. If the parties cannot themselves stipulate as to what the expense is, the court may hear testimony and fix what the reasonable cost of raising and lowering the defendants' agents is, and then direct the defendants to pay it.

In an application for an inspection order, it does not follow that, because the plaintiffs, witnesses testify as to certain facts concerning the vein in controversy, the defendants should not be permitted to examine the workings, and determine for themselves whether or not these conditions actually exist.

Where work is being conducted on the claim, and development is constantly taking place, and the initial points from which surveys of the

underground workings are made shift their position from time to time because of movements in the earth, or are destroyed by mining operations, so that in order to make a complete survey it is necessary to review the former surveys in order to determine with some degree of accuracy the relative position of the new openings made, the court may, in its discretion, permit a resurvey of all the workings, although a survey had already been made under a former order of the court, and it may also permit weekly inspections of the work of development in progress.

State v. District Co., 30 Mont. 206, 76 Pac. 206 (1904). An order permitting inspection of the workings of a mine should determine and fix the means of access necessary, and not leave it to the choice or caprice of the person obtaining the order to demand access by such openings as he may deem convenient. The order should also strictly limit the examination to the workings of which it is necessary for the person obtaining the order to have knowledge.

It is error in such an order to fix the cost of lowering and hoisting the agents of the person making the inspection, without first hearing evidence as to such cost.

An order that the defendant shall lower and hoist the agents of the plaintiff into and from the underground workings by means of the defendant's own appliances does not violate the fourteenth amendment to the Constitution of the United States.

Pennsylvania.

Heath v. Walton & Co., 9 Pa. Dist. Rep. 206 (1898). Pending an action by the surface owner against the owner of underlying mineral for damages caused by neglect to maintain support of the surface, on petition of the plaintiff, a survey of the mine was ordered.

Heath v. Walton & Co., 9 Pa. Dist. Rep. 218 (1900). Plaintiff having been successful in this action, the expense of the survey could not be taxed as a part of the costs. The survey had been ordered at plaintiff's instance, and he should bear the expense.

CHAPTER XXIV.

JOINT OWNERSHIP OF MINES.

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|------------------------------------------|---------------------------|
| I. Rights and Relations of Joint Owners. | II. Partition of Mines. |
| | III. Mining Partnerships. |

I. RIGHTS AND RELATIONS OF JOINT OWNERS.

p. 744. See, also, chap. I, div. IV, and chap. VI, div. II, C, above.

In Minnesota a statute has been enacted by which the opening, working and operating of mines held in common is determined by an order of court upon an application by a majority in interest of those holding title. Act of April 15, 1907, c. 177, p. 198.

United States.

G. V. B. Min. Co. v. First Nat. Bank of Hailey, 35 C. C. A. 510, 95 Fed. 35 (1899). See this case on page 681.

Sweeny v. Hanley, 61 C. C. A. 153, 126 Fed. 97 (1903). 9th Circ. Under the provisions of the statute of Idaho, as construed by the supreme court of that state in *Hawkins v. Spokane Hydraulic Min. Co.*, 2 Idaho, 970, 28 Pac. 433, 33 Pac. 40 (see Vol. 1, page 761), the owner of the majority interest in a mine is entitled to mine and control its operations, in the absence of any showing of fraud or wrongdoing, accounting, of course, to the other owner for his proportion of the net proceeds. But he cannot thus mine to the exclusion of his co-owner, who has the clear, legal and equitable right of access to any and every part of the property, and to its proper inspection, to the end that he may see that his rights are respected and protected, and that he may receive his just proportion of the net proceeds. Where the owner of the majority interest excludes the owner of the undivided minority interest from the premises, and goes on mining and disposing of the ore, the act is a willful and unlawful trespass, in which the wrongdoer must be held responsible for the gross value of the property unlawfully taken. There is no force in the argument that where the excluded tenant in common knows of the willful trespass and does not apply for a preliminary injunction on commencing suit, he should be allowed only the net proceeds appertaining to his interest.

Stevens v. Grand Central Min. Co., 67 C. C. A. 284, 133 Fed. 28 (1904). 8th Circ. "The general rule that co-tenants stand in a relation to one another of mutual trust and confidence, that one will not be permitted to

act in hostility to the others in respect of the joint estate, and that a distinct title acquired by one will inure to the benefit of all, applies with full force to the joint owners of a mining claim. A co-owner who amends the location notice, relocates the claim or procures the issuance of a patent in his name, will not be permitted to thus exclude the other owners and appropriate the claim to himself, but will be declared to hold the right or title thereby acquired in trust for all. * * * Nor will the trust be avoided or its enforcement be defeated merely because a stranger to the original claim participates with the unfaithful co-owner in the proceedings to wrongfully exclude his companions in interest, and jointly with him acquires the title to which they are entitled."

Shea v. Nilima, 66 C. C. A. 263, 133 Fed. 209 (1904). 9th Circ. Where several persons enter into an agreement to explore the public domain and discover and locate mining claims for their joint benefit, and one of them locates a claim in his own name only, he will be held to hold the legal title to the interests of the others in trust for them.

Lockhart v. Leeds, 195 U. S. 430, 49 Law. Ed. 263 (1905). See this case on page 306.

Hendrichs v. Morgan, 92 C. C. A. 558, 167 Fed. 106 (1909). 9th Circ. See this case on page 260.

Alaska.

Garside v. Norral, 1 Alaska, 19 (1888). When two persons jointly take the first steps to acquire title to mining claims by locating them, and by complying with the mining laws in reference thereto, they acquire an interest in the real state as tenants in common.

Binswanger v. Henninger, 1 Alaska, 509 (1902). See this case on page 661.

McMahon v. Meehan, 2 Alaska, 278 (1904). Where two persons agree in writing to locate mining claims in partnership, claims located by one during the continuance of their relation become their joint property, although located in the name of one only. But the other cannot maintain a suit to compel the conveyance of a half interest to him if he has failed to perform his part of the agreement.

Colorado.

Mills v. Hart, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241 (1898). A purchase by a cotenant of a mining claim, of a title initiated by a relocation of the same ground, inures to the benefit of his co-owners for whom he will be held to be a trustee, as will also a purchaser from him with notice. The issuance of a patent to the latter was not conclusive of the rights of the parties. Under *Turner v. Sawyer*, 150 U. S. 578, 39 Law. Ed. 1189 (see Vol. 1. p. 425), the patentee would hold as trustee for the co-owners.

Colorado Fuel & Iron Co. v. Pryor, 25 Colo. 540, 57 Pac. 51 (1898). Where a tenant in common conveys by a lease a right to mine coal in an undivided

one-half interest in the premises, such lease will be binding on the lessee, where the latter is not prevented from mining coal on the demised premises by the other tenants in common of the premises.

People v. District Ct. of Lake County, 27 Colo. 465, 62 Pac. 203 (1900). Where plaintiff and defendants are joint owners of a group of mining claims, and the defendants own also an adjoining group, and a tunnel has been run through the former group, and the defendants have extended this tunnel into, and are using it for the purpose of working, their own group of claims and thereby have excluded the plaintiff from the tunnel, the plaintiff is entitled to an injunction enjoining the defendants from transporting ore or material of any kind from their own claims through the tunnel belonging to the claims owned jointly, and also enjoining the defendants from excluding the plaintiff from the use of the tunnel.

Ballard v. Golob, 34 Colo. 417, 83 Pac. 376 (1905). Where several co-owners of a mining claim apply for and obtain a patent to the exclusion of another co-owner, the patentees will be held to be trustees for him to the extent of his interest. The statute of limitations begins to run in favor of such patentees against the excluded co-owner from the time that the trust is repudiated by the trustees and knowledge of such repudiation is brought home to the cestui que trust.

Payment of taxes by one or more co-owners is payment for the benefit of all.

Davidson v. Fraser, 36 Colo. 1, 84 Pac. 695, 4 L. R. A. (N. S.) 1126 (1906). See this case on page 452.

Missouri.

Gregg v. Roaring Springs Land & Min. Co., 97 Mo. App. 44, 70 S. W. 920 (1902). As between tenants in common of mining lands, where one is in exclusive possession with the consent of the other, §§ 8766-8767, Rev. St., have no application. The tenant so in possession, in the absence of an agreement as to time, is but tenant at will, or from year to year. The relation between them is not governed by the mining statute. If one tenant in common leases his moiety to the other, they bear the relation and are subject to the obligations, and entitled to the rights of landlord and tenant, and there is no longer the obligation to account as a cotenant.

Montana.

Harrigan v. Lynch, 21 Mont. 36, 52 Pac. 642 (1898). Section 592, Code Civ. Proc., provides: "If any person shall assume and exercise exclusive ownership over or take away, destroy, lessen in value or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist." One tenant in common of a lode claim operated the mine without the consent of his cotenant. He took out and sold ore, but the proceeds were less than the expenses; there was consequently no profit. His operations were in

good faith and in miner-like manner, but he did not render any account to his cotenant. He was held to have assumed and exercised exclusive ownership under the above statute and was enjoined from further operations.

An offer to prove that the defendant's development and operation added to the value of the claim was excluded as irrelevant.

Conrole v. Boston & M. Consol. Copper & Silver Min. Co., 20 Mont. 523, 52 Pac. 263 (1898). One of two cotenants of a mine, together with third parties, was about to build therein a tramway, which was to be used exclusively by them for hauling ores over the property so held in common from mines owned by the said cotenant and such third parties to a smelter of one of them. At the suit of the other cotenant an injunction was granted against the construction of the tramway.

Beck v. O'Connor, 21 Mont. 109, 53 Pac. 94 (1898). The lessees of a mine, who had agreed that it should be worked continuously, transferred to A. five-sevenths of their interest in the lease on condition that he would comply with the terms thereof. Later they transferred the remaining two-sevenths to B. B. performed no work whatever; but A., by continuing the mine in operation, prevented its forfeiture. It is held that under such circumstances he has a lien upon B.'s share, so as to secure a proportional contribution from him. "He (i. e., B.) could not, in equity, appropriate the benefits resulting from the work and expenditures of Olds on the premises without becoming liable for his share of the work and expenditures necessary to preserve the leasehold estate. Therefore Olds had a claim against plaintiff and was entitled to a lien on his interest therein for his share of such work and expenditures."

Butte & Boston Consol. Min. Co. v. Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825 (1901), reversing 24 Mont. 125, 60 Pac. 1039. Where the common-law relations of cotenants have been modified by legislation so that one cotenant may bring trover or trespass (Act of February 8, 1865, Bannack's St. p. 454), or obtain an injunction (Code Civ. Proc. 1895, § 592) against a cotenant who, without his consent, mines and removes ore from the common property, a subsequent law (Laws 1899, p. 134) which restores the old common-law rights of cotenants to mine, if they do so without waste and account to their cotenants, is void so far as regards cotenancies created prior to its passage, and subsequently to the acts which abrogated the common-law rule, because it interferes with vested rights.

Mullins v. Butte Hardware Co., 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430 (1901). Where the locators of a mining claim agree that one of their number shall secure a patent therefor, and then shall execute to his fellows deeds which will convey to each a title in severalty to a specified part of the surface of the claim, and an undivided interest in the minerals beneath the surface, when a patent is obtained, the locators become as between themselves, by virtue of the agreement, cotenants of the minerals beneath the surface of the claim, but owners in severalty of the specified parts of the surface.

If, however, the locator who obtains the patent merely conveys to each colocator an undivided interest in the claim, the agreement that the surface should be held in severalty binds only such subsequent purchasers of the interests of any of the owners as have actual knowledge of it, and the mere fact that the several owners are in possession of that part of the surface which they agreed should be conveyed to them in severalty does not put such purchasers on notice, because it is consistent with the title disclosed by the record, namely, that the owners are cotenants, for each cotenant has a right to the possession of the whole or of any part of the common property.

Nevada.

Paul v. Cragnaz, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540 (1900). Where a cotenant of a mining property excludes and ousts his cotenant, or his cotenant's lessee, from the mine, the latter is not confined to an action for partition of the common property, or an accounting of the rents and profits received by the defendant from the mine, but is entitled to an action for damages suffered by not being allowed to exercise his right to work the mine. The measure of damages is the profits the plaintiff would probably have made had he been allowed to develop his interest in the mine, taking into consideration his ability as a practical miner, the condition and richness of the mine, the number of tons that he could have removed, the number of men that he could have employed, the cost of removal of the ore, and so on.

It is not in the power of a tenant in common of a mining claim to convey the whole of the mine or the whole of a distinct portion by metes and bounds; such a conveyance would be void as against the cotenants; but the respective cotenants may convey their shares of the whole mine to one or many grantees, as they please, so the share be of the entire mine.

South Dakota.

McCarthy v. Speed, 11 S. D. 302, 77 N. W. 590, 50 L. R. A. 184 (1898). Where cotenants of a mining claim failed for several years to perform the assessment work, and thereupon one of them made a relocation of the claim, he holds such claim as trustee for the others, and cannot assert rights adverse to theirs. See this case also on page 376.

Hawgood v. Emery, 22 S. D. 573, 119 N. W. 177 (1909). See this case on page 347.

Utah.

Strickley v. Hill, 22 Utah, 257, 62 Pac. 893, 83 Am. St. Rep. 786 (1900). The consent of an owner of an undivided interest in a mining claim to the establishing of a certain line as a boundary cannot bind his co-owner, who did not consent.

Washington.

Cedar Canyon Consol. Min. Co. v. Yarricood, 27 Wash. 271, 67 Pac. 749, 91 Am. St. Rep. 841 (1902). Where the cotenants of a patented claim discover that the vein upon which they are working apexes in another claim, and in order to protect themselves in the working of their claim buy, in the name of one cotenant, a controlling interest in the claim upon which the vein apexes, the purchase inures to the joint benefit of all the co-owners, and a grantee of the part of the interest owned by the cotenant in whose name the interest had been bought cannot assail the title of the parties to the original claim, so as to defeat the claim of the cotenants other than its grantor, to a share in said interest. The fact that the cotenants in whose name the interest was not bought have not contributed their share of the purchase price thereof is not material where no request or demand ever was made on them for their contribution.

II. PARTITION OF MINES.

p. 747. See, also, chap. I, div. IV, above.

Although as a general proposition mines and mining property are not susceptible of actual partition by metes and bounds, yet instances where such division was found possible occur in Nevada and Alaska. Provision is made for partition where the ownership of the minerals is separate from the ownership of the surface, without joining the surface owner, in North Carolina, by Revisal of 1905, § 2488.

United States.

Manley v. Boone, 87 C. C. A. 197, 159 Fed. 633 (1908), 9th Circ., affirming *Boone v. Manley*, 2 Alaska, 552 (1905). While mining property from its nature is not as a rule susceptible of division, and consequently partition of such property must generally result in its sale, yet such property may be divided among the owners in proportion to their respective interests. And where according to the terms of the statute of Alaska, under which the proceedings were taken, the property must be so divided unless it appears that a partition cannot be had without great prejudice to the owners, that is a question of fact; and a finding by the trial court that a division should be made will not be disturbed on appeal. The court below found that the pay streak ran through the middle of the claim, was of approximately equal value throughout its whole length, and that a sale would bring a small return.

Colorado.

Brown v. Challis, 23 Colo. 145, 46 Pac. 679 (1896). Colo. Sess. Laws 1893, p. 358, adds a proviso to M. A. S., § 3346, which confers jurisdiction

in partition, to the effect that the act shall not apply to mining property where the commissioners report that the same cannot be partitioned consistently with the interests of the estate or without great prejudice to the owners. This provision is not retrospective.

Illinois.

McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622 (1904). The ownership of all the minerals underlying a certain tract of land is a legal estate of freehold, and when held by tenants in common is subject to partition.

Brand v. Consolidated Coal Co., 219 Ill. 543, 76 N. E. 849 (1906). Complainant was the owner of the surface and of an undivided one-fourth of the underlying coal; defendant was the owner of three-fourths of the coal. Complainant brought a bill for partition, averring that she elected to treat her undivided one-fourth of the coal as severed from the surface, and that the defendant had removed a portion of the underlying coal, not merely a portion of the three-fourths which it had a right to mine. The bill was dismissed.

"Tenants in common of coal beneath the soil which has been severed from the surface are entitled to partition, but they must be tenants in common to have that right." "It has been held that the court, in a partition proceeding, may, with the consent of the parties, sever the underlying coal from the surface and give the surface to one and the coal to another (*Ames v. Ames*, 100 Ill. 599, 43 N. E. 592, see Vol. 1, page 21). But in this case no consent of the defendant to a severance was alleged." Here, however, the bill does not show that the defendant's three-fourths of the coal or any part of it is still in place. "There could be no partition of coal that had been removed, and the bill fails to show that there is anything remaining to be partitioned, and therefore fails to show that complainant and defendant are tenants in common of the coal."

Kansas.

Beardsley v. Kansas Nat. Gas Co., 78 Kan. 571, 96 Pac. 859 (1908). In an action by lessees of an oil and gas lease for a partition of their interests therein, the lessors having no interest are not necessarily parties.

An ordinary gas lease, demising a tract of land for the sole and only purpose of mining and prospecting for oil and gas for the term of ten years, and as long as oil or gas is procured by the lessee, does not convey an interest in the real estate, and an action for partition thereof under the Kansas statute will not lie, but an action for the partition of the lease as personal property may be maintained. In such case, however, the petition will be deemed insufficient unless it contains averments which show the condition of the property to be such that equitable intervention is necessary to preserve the property, or to protect the interests of the owners; for instance, loss in value, mismanagement or irreconcilable differences as to disposition or control of the property.

Nevada.

Royston v. Miller, 76 Fed. 50 (1896). C. C. D. Nev. In Nevada, under Gen. St. § 5334, partition where possible will be ordered in preference to a sale. In this case it was found possible.

West Virginia.

Hall v. Vernon, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791 (1899). A decree of partition of the oil and gas in a tract of land which was owned separate from the surface was held to be void. The majority of the court "take this position on the ground that oil and gas are fugitive, and that co-owners of them, not owning the surface, have a mere right to explore for them, and that it is impossible to partition the same in kind, owing to the nature of oil and gas, and that a court cannot be called on to do an impossible thing, and has no jurisdiction to partition such a right by allotting gas and oil under certain sections of the surface. They hold that partition can be made only by sale and division of proceeds." Bannon, J., dissents. Dent, J., concurs on the ground that the right to the oil and gas is an incorporeal hereditament and therefore impartible.

Preston v. White, 57 W. Va. 278, 50 S. E. 236 (1905). In a bill for partition of the oil and gas underlying a tract of land, a sale will be directed, as these minerals are not susceptible of division. See this case also on page 66.

Robertson Consol. Land Co. v. Paull, 63 W. Va. 249, 59 S. E. 1085 (1907). Title to all the coal, gases, salt, water, oil and minerals of every kind and description in, upon and under a certain tract of land, when held in common by several parties, none of whom have any interest in the surface, is not susceptible of partition by metes and bounds. It can be partitioned only by a sale and a division of the proceeds thereof.

McMullen v. Blecker, 64 W. Va. 88, 60 S. E. 1093, 131 Am. St. Rep. 894 (1908). K. leased all the coal under his land with the right in the lessee to mine it to exhaustion in consideration of a royalty or of a fixed sum to be paid annually in case the minimum quantity was not mined. The lease contained a provision that it should be void upon default in the payment of this fixed sum. Upon the death of K., leaving eleven heirs, one of whom was a minor, the holder of a majority of the stock of the corporation, which held an assignment of the lease, bought the interest of all of the heirs in the coal except that of the minor, and then in this suit brought an action against that minor for partition. It was held that he was not entitled to partition. There being other interested stockholders besides him, as against the corporation, there could be no partition of the coal in kind. The lease had never been forfeited by any act of the lessor or his heirs, if for any cause it could have been. No part of the coal could be set off in kind to either party and operated independently of the company. So long as the right of the company to take the coal under the lease exists, the only right of the lessor or his heirs, or of the plaintiff as their grantee, is to have the royalty, which is a simple money demand. The

lessee has the right to mine coal to exhaustion, taking the very substance of the thing sought to be partitioned. The plaintiff has no interest except in the coal. The defendant has an interest not only in the coal but in the surface as well. It is true as a general rule that a subsisting lease of land, though material in determining whether partition should be made in kind or by sale, is no defense to a partition of the land. Nevertheless, when the thing sought to be partitioned has been in effect sold, as in this case, though subject to become revested for breach of a condition, there is nothing upon which partition could operate until the happening of the event which would revest the title.

III. MINING PARTNERSHIPS.

p. 750.

United States.

G. V. B. Min. Co. v. First Nat. Bank of Halley, 35 C. C. A. 510, 95 Fed. 35 (1899), 9th Circ., affirming *First Nat. Bank of Halley v. G. V. B. Min. Co.*, 89 Fed. 449 (1898). C. C. D. Idaho. Under Idaho Rev. St. 3300-3309, a mining partnership exists where joint owners "actually engage in working" the mine. Where two of three owners work without the consent of the third, he is not a partner.

The owner of an undivided one-third of a mining property has not a lien upon the proceeds of the mine for past profits, as against a mortgagee of the other two-thirds. This is the case whether he is a partner or merely a co-owner.

Under the Idaho statutes and the law as laid down in the cases, a mining partner has a lien on the partnership property for debts due to creditors and for moneys advanced for the use of the partnership, but not for his share of past profits.

Roberts v. Date, 59, C. C. A. 242, 123 Fed. 238 (1903). 9th Circ. A., by written contract, agreed with B. and C. that, in consideration of money and supplies to be furnished to his wife, and all supplies and expenses necessary for his outfit in developing mines in Alaska for the year 1900, he would transfer to them a half interest in the mines that he then possessed, in Alaska. There was no requirement that A. should do any work in developing these mines which he then possessed. After the execution of the agreement A., B. and C. went to the mines together, each taking his own provisions, with the understanding that B. and C. were to perform half the assessment work for that year. B. and C. soon abandoned the enterprise and separated from A., who later left the neighborhood of these mines and went elsewhere and made other discoveries and locations. Held that, while there was a tenancy in common of the mines, there was no partnership and no partnership property, and

no partnership enterprise was contemplated. The agreement was one merely of bargain and sale, and not a partnership agreement nor a grub-stake contract. B. and C., therefore, had no interest or right in the locations subsequently made by A.

Cascaden v. Dunbar, 84 C. C. A. 566, 157 Fed. 62 (1907). 9th Circ. B., on behalf of himself and D. and S., the three being general partners engaged in freighting, entered into an oral agreement with C., whereby he was to prospect for and stake placer claims for and in the name of B., D. and S., and they were to record the location certificates and perform the other legal requirements and convey a half interest in the claims to C. From that time the partners engaged in acquiring, locating and working placer mines. C. located certain claims, and delivered the location certificates to B. Of this D. and S. had notice. B., D. and S. did not record these certificates, but after the time for recording had expired, themselves relocated the claims. It was held that they were mining partners and that the agreement made by B. bound them all, and consequently they were required to convey to C. a half interest in the relocated claims. See this case also on page 200.

Kelley v. McNamee, 90 C. C. A. 357, 164 Fed. 369 (1908). 9th Circ. A mining partnership, unlike an ordinary partnership, is not dissolved by the sale of the interest of one of the partners, but it does not follow from the mere continuance of the partnership that the partner selling his interest continues liable for all the debts of the partnership subsequently incurred. He is liable for wages of laborers subsequently incurred, if the laborers had worked for the partnership while he was a member, and they had continued to work afterwards without notice of the sale of his interest. But he is not liable, if they had such notice and then continued to work, nor is he liable to laborers who commenced work after he parted with his interest, for with them he had never had any contractual relation in respect to the property.

McGahey v. Oregon King Min. Co., 165 Fed. 86 (1908). C. C. D. Or. Five persons formed an association to prospect for mineral and locate claims in a locality where one of them had previously found a piece of gold-bearing quartz. The members of the association, whose number was subsequently increased to seven, made two expeditions to the territory in question and located claims upon which they did some development work. It was found by the court that the scope of the agreement of association was limited to these two expeditions. On the second expedition, at a distance from the claims of the association, a piece of rock was handed to one of the partners by a stranger, who had picked it up, and also told where it had been found. This information was imparted to all, the rock was placed with other samples and no attention was paid to it until after the expedition. The partner to whom it had been handed then had it assayed, and finding that it contained gold, he and two others of the partners went to the place where it was found, located claims, and conveyed them to a corporation organized for the purpose. It was held that the remaining partners were not entitled to an interest in these claims. The

finding of the piece of rock was not a discovery, and the location and the information on which it was based came after the original association was at an end. "The information was not even acquired upon a partnership transaction, nor from connection with the association, nor is its character such, in any view of the law, as belongs to the partnership in the sense of property which was valuable to the association and in which it had a vested right."

Howard v. Luce, 171 Fed. 584 (1909). C. C. W. D. N. Y. A bill in equity for an accounting was filed in which it was alleged that the complainants and defendants became tenants in common of certain mining lands, and were and continued copartners and owners of such property, and as such copartners continued to develop, operate and manage said property and to engage in mining for gold and in the mining business thereon. A demurrer on the ground that the bill was without equity was not sustained. "Tenants in common of a mine may form a partnership to work the mine, in which case the mine itself may or may not be put in as a firm asset, or tenants in common of a mine may work it without forming any partnership. I think the meaning of the allegations in the complaint is that the parties to this action were partners in operating the mine. If they were partners, any one of them is entitled to an accounting. Even if they were not partners, but as tenants in common worked the mine under some joint arrangement, they are probably entitled to an accounting; the question depending upon what the arrangement was."

Loy v. Alston, 96 C. C. A. 578, 172 Fed. 90 (1909). 8th Circ. "A mining partnership differs in some respects from the ordinary commercial partnership. It may be formed, continued and dissolved in either of two methods, (1) by the usual partnership agreement, or (2) by the joint ownership of undivided parts in a mine or lease, and by the operation of a mine or lease by some of the joint owners with the consent or acquiescence of the other joint owners. A commercial partnership is dissolved when one of the partners disposes of his interest, but a mining partnership, which results from the operation of a mine by some of the joint owners with the consent of the others, is not dissolved by the conveyance by one of these owners of his interest in the mine or the lease to a stranger; but the grantor then ceases to be a member of the copartnership, and the stranger becomes a partner in his place. The *delectus personae* which is an essential element of an ordinary partnership is not an indispensable attribute of a mining partnership."

One joint owner who conveys to a stranger thereby ceases to be a member of the partnership. Such a one who thereafter intrudes himself into the management of the mine and incurs losses cannot recover from one of the joint owners. This conclusion is not affected by understandings and parol agreements for a reconveyance of an interest, such a conveyance being within the statute of frauds of Missouri.

Alaska.

McMahon v. Meehan, 2 Alaska, 278 (1904). An agent who locates a mining claim for his principal does not thereby acquire an interest in the claim, which inures to the benefit of his principal in the absence of a contract giving him an interest. But if subsequently, without any contract, the agent and principal engage jointly in working the claim, they become mining partners, though not joint owners.

Marks v. Gates, 2 Alaska, 519 (1905). "A mining partnership exists when two or more persons, who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same."

California.

Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727 (1896). Section 2453, Civ. Code, which continues a partner's liability after dissolution until personal notice thereof is given, applies to mining partnerships. *Semble*, that it applies where one mining partner sells his interest, which works a dissolution as to him.

"The law governing general co-partnerships with a few well defined exceptions, applies to mining co-partnerships; therefore, a mining co-partner, who claims exemption from the general law of partnerships, must show his case to be within some one of those exceptions."

Dorsey v. Newcomer, 121 Cal. 213, 53 Pac. 557 (1898). "It is not always easy to determine what constitutes the partnership property of a mining partnership. The statute provides that the mining ground owned and worked by partners in mining, whether purchased by the partnership or not, is partnership property. It does not follow that property other than the ground owned and worked may not also be partnership property. No doubt, other property acquired by the partnership for the purpose of aiding in working the mining claim, such as a mill or mill site, would also be property of the partnership. So other mining ground acquired for the purpose of working with the mining ground already being worked, and so situated that it can be worked with the original claim as parts of one mine, would be partnership property. And generally, it may be admitted that property acquired by the partnership by the use of partnership funds, as distinguished from the individuals constituting the firm may be so regarded. But the statute evidently distinguishes between ground owned or acquired for the purpose of working and ground actually worked. It is only the last that in general can be regarded as partnership property when not acquired by the partnership or by the use of its funds."

Ferris v. Baker, 127 Cal. 520, 59 Pac. 937 (1900). Civ. Code, § 2511, provides that "a mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same." Section 2512 provides that "an express agreement to become partners * * * is not necessary to the formation or existence of a mining partnership. The

relation arises from the ownership of shares or interests in the mine, and working the same for the purpose of extracting the minerals therefrom." Held that there is sufficient evidence to go to the jury to find the existence of a mining partnership between A. and B. under these sections, when it is shown that A. and B. owned the mining claim in equal shares, and that A. and a party whom B. admitted to be her agent developed the mine and extracted ore therefrom.

Prince v. Lamb, 128 Cal. 120, 60 Pac. 689 (1900). A. and B. entered into an agreement whereby A. furnished funds to B. with which to locate mining claims in Alaska. B. was to notify A. as soon as he discovered any claims, and A. was thereupon to go to the claims and furnish one-half the labor and expenses of working them, A. to have an undivided one-half of all the claims thus located and one-half the net proceeds of all minerals mined therefrom after the first year. This contract did not constitute a mining partnership under § 2511, Civ. Code, under which the parties must be associated together in the ownership or possession of the property in some way. It was merely an executory contract to establish a partnership in the future.

Holdt v. Hazard, 10 Cal. App. 440, 102 Pac. 540 (1909). An express agreement between the parties that they should hold and work a mining claim for their joint use and benefit, coupled with evidence of work being done on the property, is sufficient to establish a partnership.

Colorado.

Hurd v. Tomkins, 17 Colo. 394, 30 Pac. 247 (1892). The purchaser of a one thirty-second of a claim was charged as a partner on evidence that he had inspected the mine and had said to the person in charge of the mine that he was willing to pay his share of the expense of mining to continue the work for another year.

"The same strictness of proof is not required of a plaintiff to charge the defendants as partners as would be necessary if the suit had been instituted by instead of against the firm."

Continental Divide Min. Inv. Co. v. Bliley, 23 Colo. 100, 46 Pac. 633 (1896). The failure of a member of a mining partnership to pay his share of the expenses for a period of 90 days does not work a forfeiture of his interest.

Ashenfelter v. Williams, 7 Colo. App. 332, 43 Pac. 664 (1896). A contract by which two persons agreed that one would furnish to the other certain ore from his mine which the latter was to reduce and concentrate at a certain price, and the latter was to have an undivided one-fourth interest in certain ores extracted from the mine, both parties to share the expense and profits of extracting the ore and of concentrating it, constitutes the parties partners in the enterprise of mining and milling the ore. A modification of such contract, whereby the one party was to bear certain of the expenses of concentrating the ore, and in return to receive out of its proceeds a certain price per ton, does not alter the partnership status of the

parties. Neither is such status affected by an agreement that one of the parties should ship the ore and pay out the proceeds therefrom under the direction of the other, who was to manage the mine.

Caley v. Cogswell, 12 Colo. App. 304, 55 Pac. 939 (1899). Where it is shown that A. simply performs labor as a common miner and employe for B., without attempting to exercise any acts of authority or ownership and without being consulted as to any of the operations carried on, and the mining lease is taken in the name of B. alone, who alone manages and controls all the operations carried on, including the marketing of the ores, the payment of bills, etc., and there is no community of profit or loss shown, but all the losses are born by B. alone, there is no evidence from which a partnership between A. and B. can be inferred.

Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735 (1899). Where persons are jointly engaged in working a mine, some of them agreeing to contribute the money, and another his services, and all to share equally in the profits, this agreement constitutes a mining partnership, and, the facts being undisputed, the court may so rule as a matter of law.

Dodge v. Chambers, 43 Colo. 306, 96 Pac. 178 (1908). A corporation having operated a mine for some time, it proved unproductive and the funds of the corporation were exhausted. Thereafter stockholders of the company, without any formal action by the corporation, but by agreement among themselves, contributed each month their pro rata share of the expenses incurred in operating the property, with the understanding among themselves and with the company that the sums so advanced should be repaid out of the first earnings from the mine. Held, they did not thereby become partners in prosecuting the work. The work was at all times carried on by the corporation as such, and the contributions by these men were voluntary loans or advances to the company by them as stockholders, and were expended and disbursed by the manager of the company for services rendered and supplies furnished to the corporation as such.

Walker v. Bruce, 44 Colo. 109, 97 Pac. 250 (1908). The plaintiff and defendant obtained a lease of mining property and a bond for its conveyance upon payment of a sum certain by a fixed date, which date was extended for a consideration, each party paying half. Under the bond and lease they agreed to work the property jointly, each to bear one-half the expense; defendant was to put in his own work and plaintiff was to furnish a man to represent him in the doing of an amount of work equal to what should be done by defendant. This constituted a mining partnership with equal rights to each. "A mining partnership is held to exist where the several owners of a mine co-operate in the working of the mine." "A mining partnership may exist as well where the parties have an interest merely in the working of the mine, or in carrying on mining operations as where they own the mine itself."

Idaho.

Brown v. Bryan, 5 Idaho, 145, 51 Pac. 995 (1896). Where one member of a mining partnership used the money of the partners to purchase an

outstanding trust deed upon the mining property, given by his copartner, taking the transfer in the name of a third person, who had no interest in the transaction, then caused the property to be sold and bid in by such third person as his agent, and afterwards procured a transfer to be made to himself and another partner, it is held that such transfer was void, and the property should be decreed to belong to the maker of the trust deed or his grantee.

Madar v. Norman, 13 Idaho, 585, 92 Pac. 572 (1907). Under Idaho Rev. St. §§ 3300 to 3309, in order to create a mining partnership, two or more persons must first acquire a mining claim and this acquisition must be followed by actually engaging in working the mine. If A., B., C. and D. each owned a fourth interest in a claim, and A., B. and C. united in working the mine, A., B. and C. would become partners, D. being merely a cotenant of the property. If none of them did any work on the mine except the annual assessment work, they would all be cotenants merely, not partners.

Iowa.

Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195 (1904). In order to create a mining partnership, it is necessary that there be an agreement to work the mine for the joint profit of the parties; otherwise the owners of the mine are merely tenants in common.

Missouri.

Freeman v. Hemenway, 75 Mo. App. 611 (1898). "When persons acquire interest in lands apparently for the sole purpose of working mines in them they must be considered as entering into a commercial partnership."

* * * "A mining partnership arises only by implication from co-operation in the working of the joint property. There may be a partnership in the working of a mine subject to the law of ordinary partnership. The working of a mine has been denominated a species of trade and if it is made the subject of a partnership agreement, the relation arising therefrom is a commercial partnership. A commercial partnership arises from agreement. In such case new members cannot be intruded without the consent of the others. If one of the partners, in such partnership, convey his interest to another, the grantee would not become a member of the firm, he would be a tenant in common with the remaining partners. If, however, they should continue to work the mine, they would, in that event, become mining partners. It is thus to be seen that a mining partnership relation may arise in two ways: First, By operation of law where there is no partnership agreement but co-operation by co-owners or joint tenants in the working of mining property; and, Second, by agreement of the co-owners or joint tenants. In partnerships of the former kind there is no *delectus personae*, consequently the membership is continually subject to changes beyond the contract of the partners. *Decker v. Howell*, 42 Cal. 636. In the latter kind of partnership the *delectus personae* exists, and a new partner can no more be in-

truded therein without the consent of the remaining partners than in a strictly commercial partnership."

- *Tamblyn v. Scott*, 111 Mo. App. 46, 85 S. W. 918 (1905). B. and H. being joint owners of a lease agreed with S. that he should sink a shaft to a certain depth or to pay ore, for which they were to give him a half interest in the profits. It was further agreed that in certain events the profits of the mine were to be divided among them pro rata. Held that, although it was agreed that S. should pay for all the work and material, B. and H. could be held as his partners.

Dale & Bennett v. Goldenrod Min. Co., 110 Mo. App. 317, 85 S. W. 929 (1905). If persons are jointly engaged in extracting ore or mineral from a mine, sharing in the profits and losses according to their respective interests therein, they are partners, although there is no express agreement to become partners or to share in the profits and losses. (*Snyder v. Burnham*, Vol. 1, p. 762, followed.)

Montana.

Congdon v. Olds, 18 Mont. 487, 46 Pac. 261 (1896). In an action in which it is sought to charge the defendants on a note signed by one of them, it is error to charge the jury that "if parties associate themselves together for the purpose of carrying on a business and agree to contribute funds, pay losses and share profits, such an association is a general partnership without regard to whether the business is mining or not." While these elements are those of a general partnership, they are also those of a mining partnership.

Nevada.

Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. 151 (1895). A mine owned by a number of persons was held by plaintiff under what the complaint designates a lease. Defendants, owners of a quartz-mill, purchased a half interest in the mine, while the lease was in force. The parties then made a contract in writing, by which defendants were to haul the ore to their mill, reduce it to bullion and account for 85 per cent of the assay value. Out of the proceeds defendants were first to be allowed \$25 per ton; plaintiff was then to be paid the expense of mining it. Of the balance plaintiff was to have half and the rest was to be divided among the owners of the mine.

This did not constitute a partnership. The owners of the mine were tenants in common, but as they were not engaged in working it, there was no mining partnership between them. After the ore was mined the plaintiff and the several owners of the mine became the joint owners of it. But they did not do a joint business and there was no community of interest. There was therefore no commercial partnership.

Costello v. Scott, 30 Nev. 43, 94 Pac. 222 (1908). A grub-stake contract, whereby one party supplies the outfit and the other performs the work of prospecting and location, and both share in the claims located, is not a

partnership, unless the agreement goes beyond the mere furnishing of supplies in consideration of participating in the discoveries. A grub-stake contract properly only covers the search for and location of mines on the public domain. Where the object of the venture is not only to prospect and locate, but also to work and develop the mines and conduct a general mining business, it amounts to a mining partnership.

Ohio.

Ervin v. Masterman, 8 Ohio C. D. 516 (1898). "There is much in the nature of the business of mining for oil, as carried on in this country, that likens it to mining operations and the uses of mining properties where ore instead of oil is the product, and we think that many of the special rules applicable to mining partnerships, so called, should be applied to the operations carried on by co-owners of oil producing property in order that the ends of justice may be reached both as respects said co-owners and those transacting business with them, and it is immaterial whether such co-owners shall be regarded as tenants in common or joint tenants, and whether the property used in such business shall be real estate, chattels real or personal chattels. One of the incidents of a mining partnership is that, if a member sells his interest in the mine, the purchaser takes it subject to any lien existing in favor of a co-partner for debts due the creditors or for advances made for the use of the concern, unless he becomes a purchaser in good faith for a valuable consideration without notice of such lien. And, if a person sells his interest in a mining company while it is engaged in working its mining ground, the purchaser will be deemed to have bought with notice of any lien resulting from the relation of the partners to each other and to the creditors of the partnership. *Duryea v. Burt*, 28 Cal. 569. Each partner may transfer his interest without consulting his fellow partners, and such transfer will not work a dissolution of the partnership." A mining partnership is held to exist where co-owners of an oil and gas lease of certain lands entered into an agreement for the sinking, equipping and operating of oil wells thereon, upon the terms that each member was to contribute toward the cost of operations and any losses that might occur in proportion to his share or interest in such property, the necessary funds to be raised by assessments made upon and collected from the members, though each member was to receive and sell on his own account and at his own pleasure his share of the gross product, to-wit, the oil produced, such agreement being followed by a transaction of the business in a common name.

Baker v. Brennan, 12 Ohio C. C. 211 (1901). Where there are tenants in common of interests in oil lands who carry on the business of producing oil, but each acquired his interest in the common property separate from his associates, and furnished and paid for his own part of the machinery and expenses, and sold his share of the oil in the pipe line separately and on his own account, and there is no express contract of partnership, such tenants in common are not partners, and are not liable for the price of

supplies furnished to one of them for use on the common property, unless they have so held themselves out as partners that they are estopped from denying that they are such.

Utah.

Bentley v. Brossard, 33 Utah, 396, 94 Pac. 736 (1908). The principal distinctions between a mining partnership and a trading partnership "are that a member of a mining partnership may assign his interest without the consent of his co-partners, and the act does not work a dissolution of the partnership; that the person to whom the interest is assigned becomes a member of the company, and it is not necessary that the other parties consent thereto. Neither does the death of a member dissolve the partnership. Another distinction is that a member of a mining partnership has not the power to bind his associates by engagements with third persons to the extent that a member of a trading or commercial firm may do. For instance the law does not imply any authority to a member of a mining partnership to borrow money, to employ counsel, to execute a promissory note, or to draw or accept bills of exchange, no matter how pressing the necessity for the use of the money. The reason assigned for the distinction, and for limiting the powers of members of a mining partnership, is that such a partnership is not founded on the *delectus personae*, whereas other partnerships are. For these reasons it is held that the powers of members or managers of mining partnerships are limited to the performance of such acts in the name of the partnership as may be necessary to the transaction of its business, or which are usual in like concerns. But a partner can bind the firm by acts in the name of the partnership in such matters as may be necessary to the transaction of the business, or which are usual in like concerns, unless there is an express agreement to the contrary known to the party contracting with the firm. Except as to these distinctions the law governing a mining partnership is not different from that applicable to ordinary commercial or trading partnerships."

A mining partnership may exist though all of the partners may not have a personal interest in the property, if they have an interest in the working of the property, and it is not essential that there be an express agreement to become partners, or an express agreement to share profits and losses, as that is an incident to the prosecution of the general business. Even an express agreement that they are not to be partners is of no consequence if their relations actually constitute a partnership.

West Virginia.

Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468 (1899). Where tenants in common or joint tenants of an oil lease or mine unite and co-operate in working it, they constitute a mining partnership. When members of a mining partnership cannot agree in management, those having a majority interest control its management in all things necessary and proper for its operation.

A sale of his interest by a member of a mining partnership to another member or a stranger does not dissolve the partnership, as in ordinary partnerships.

Partners have a lien on the social property for advances or balances due them after the payment of debts; but if they have divided the property or product of the business, giving each his share in severalty, and separating it from the balance, no such lien exists on the property or product so actually divided. Such is the case with "division orders" in oil mining; that is, where the pipe lines give each a certificate of his share of the oil committed to them, which was a product of the wells, this effects a separation of that product, making each one's share his several property, and severing it from the social property, if it was such at any moment.

Blackmarr v. Williamson, 57 W. Va. 249, 50 S. E. 254 (1905). "In an ordinary partnership the contract creating it must have been entered into by all the partners. It is only by the unanimous consent of all the persons concerned that they become partners. A third person cannot be introduced into the concern as a partner without or against the consent of a single member. This rule in no sense applies to mining partnerships." "A mining partnership exists between the tenants in common of a mine who work it together and divide the profits in proportion to their several interests. Ownership of shares or interests in the mine is an essential element of a mining partnership." "Mere profit sharing will not create a mining partnership—a mining partnership differs from an ordinary partnership in the fact that no contract between the parties is necessary to create it." "One of the partners may convey his interest in the mine and business without dissolving the partnership." He has a right to sell out to whomsoever he may without even the knowledge or consent of his co-owners. Majority interests always control and the court will not order dissolution unless good and clear grounds are shown.

Kirchner v. Smith, 61 W. Va. 434, 58 S. E. 614 (1907). "If two or more owners of a mine unite in working it, without any partnership agreement, the act of working it together creates a mining partnership; and the same is true of two or more holding interests in a lease of mining property". Co-owners of oil and gas leaseholds which they unite in working are mining partners, and one may maintain a bill for an account and dissolution against the others. Where he held title to the leaseholds for himself and in trust for the others, they are accountable to him for royalties which he had been compelled to pay by suit.

Greenlee v. Steelsmith, 64 W. Va. 353, 62 S. E. 459 (1908). Mining partners operating oil leases have a lien on the social property for advances or balances due them after the payment of debts; but having divided the product of the business by division orders, giving to each his share of the product in severalty and separating it from the balance, no such lien exists on the product thus divided, but the lien remains on the social property used in operating the leaseholds and on the productions thereafter.

Wyoming.

Hartney v. Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005 (1902). A mining partnership is constituted when tenants in common of a mining property unite and co-operate in operating and working the mine. It is the working together which makes the partnership and not the agreement between the parties, and one seeking to hold persons liable as partners in a mining enterprise has the burden of showing that they were working a mine together. A contract whereby a number of persons agree to supply another with a certain sum of money, and the latter agrees to prospect for gold, and if he discover any to share it with those who supplied the money, does not contemplate the working of a mine if discovered. The contract, therefore, is rather a prospecting or "grub stake" contract than a mining partnership, and does not bind those who agreed to advance the money for the cost of personal supplies bought by the prospector when he has exhausted the money advanced. "The implied power of a partner in a mining partnership as to third persons is not held to go further, we think, than authority to bind his co-partners by dealings on credit for the purpose of working the mine, where it appears to be necessary or usual in the management and course of the business."

CHAPTER XXV.

MINERS.

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| I. Wages of Miners. | III. Health and Safety Statutes in |
| A. Manner of Payment. | Their Relation to the Law |
| B. Lien and Preference. | of Negligence. |
| II. Health and Safety of Miners. | |

I. WAGES OF MINERS.

A. *Manner of Payment.*

p. 766. And in addition to the statutes there cited see the following, prohibiting payment in certain enumerated articles or obligations: Arkansas, Act April 5, 1905, p. 356, Act May 14, 1907, p. 749; Illinois, Act June 3, 1897, p. 270; Indiana, 3 Burns' Ann. St. 1908, § 8595; Kentucky, Carroll St. 1903, §§ 1350, 2739a; and the following statutes prescribing regulation and inspection of the weighing of coal in those mines where weight is the measure of wages: Alabama, Code 1907, §§ 1008-1012, 7419; Arkansas, Kirby's Dig. §§ 5353, 5356, 5357, Act May 1, 1905, p. 558; Illinois, Act April 18, 1899, § 24, p. 301; Indiana, 3 Burns' Ann. St. 1908, §§ 8577, 8588; Iowa, Code 1897, §§ 2490-2491; Kansas, Dassler's Gen. St. 1905, §§ 4352-4357, 4368-4373; Kentucky, Carroll's St. 1903, § 2733a, Act March 21, 1906, c. 108, p. 417; Michigan, Act May 2, 1899, p. 93, Act May 10, 1905, p. 142; Missouri, Rev. St. 1899, §§ 8786-8790; Ohio, Bates' Ann. Rev. St. 1906, §§ 295, 4373; Pennsylvania, Act May 3, 1909, P. L. 423.

Arkansas.

Woodson v. State, 69 Ark. 521, 65 S. W. 465 (1900). The act of April 10, 1899 (Acts 1899, p. 165), requiring all coal mined and paid for by weight to be weighed before it is screened, and paid for at the weight thus ascertained, is constitutional.

McLean v. State of Arkansas, 211 U. S. 539, 53 Law. Ed. 315 (1909), affirming 81 Ark. 304, 98 S. W. 729, 11 A. & E. Ann. Cas. 72 (1906). The act of 1905, c. 219, § 1, which makes it unlawful for the owner, lessee or operator of coal mines, where ten or more men are employed underground

and miners are employed "at bushel or ton rates or other quantity," to screen the output of coal mined before it is weighed and credited to the proper employe, etc., does not violate the fourteenth amendment to the Federal Constitution.

"It is the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people." "If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the Government."

"We are unable to say, in the light of the conditions shown in" the report of the industrial commission authorized by Act of Congress of June 18, 1898, "and in the necessity for such laws, evinced in the enactments of the legislatures of various States, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and the promotion of the harmonious relations of capital and labor engaged in a great industry in the State."

"There is no attempt at unjust or unreasonable discrimination. The law is alike applicable to all mines in the State employing more than ten men underground. It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state and affecting but few men, and not requiring regulation in the interest of the public health, safety or welfare. We cannot hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the Supreme Court of Arkansas, which has affirmed its validity."

California.

Skinner v. Garnett Gold Mtn. Co., 96 Fed. 735 (1899). C. C. N. D. Cal. Sections 1 and 2 of the act relating to corporations (St. 1897, p. 231), which require corporations to pay their employes at least once a month the wages earned during the previous month, and provide that the violation of this requirement shall entitle the employe to a lien and an attorney's fee in case of suit, are constitutional. They do not discriminate unjustly against corporations in violation of the state constitution which prohibits the granting of special privileges or immunities to any citizen or class of citizens; they do not deny to corporations the equal protection of the law, within the prohibition of the fourteenth amendment to the Federal Constitution; nor do they deprive corporations of their property without due process of law by interfering with their freedom to make contracts.

Kansas.

State v. Wilson, 61 Kan. 32, 58 Pac. 981, 47 L. R. A. 71 (1899). "An act to regulate the weighing of coal at the mine," being Chapter 188 of the

Laws of 1893, is constitutional and valid as a proper exercise of the police power. It does not purport to prevent the operators of coal mines and the miners employed by them from making such agreements as they choose concerning the amount of wages to be paid, or in any wise infringe upon the freedom of contract. Where miners are employed at bushel, ton or other quantity rates, it is a valid requirement of the law that the output of coal mined by them shall not be passed over any screen or other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employes and accounted for at the legal rate of weights. Information is by this means furnished to the miner by which he may act intelligently, and rest his demand for wages upon the calculated results of what he has accomplished in the past. It also affords the operator knowledge, from the use of which wages may be adjusted based upon known facts. Such law is further beneficial in that it supplies the public with statistics showing the total amount of coal produced in the state.

Kentucky.

Commonwealth v. Reinecke Coal Min. Co., 25 Ky. Law R. 2027, 79 S. W. 287 (1904). Ky. St. 1903, § 2739a, providing that mining operators should pay their employes on the 15th and 30th days of each month to within 15 days of said 15th and 30th days respectively, but if the employe be absent he should be entitled to payment thereafter on demand, and also forbidding the blacklisting of mining employes, is constitutional.

Ohio.

In re Preston, 63 Ohio, 428, 59 N. E. 101, 81 Am. St. Rep. 642, 52 L. R. A. 523 (1900). The act of March 9, 1898 (93 Ohio Laws, page 33), "to provide for the weighing of coal before screening," having no other object than to prevent the making of contracts between operators and miners whereby the former shall become bound to make, and the latter entitled to receive, compensation, having regard to the skill and care of the miner, is repugnant to the bill of rights as an unwarrantable invasion of the right to make contracts.

Pennsylvania.

Showalter v. Ehlan, 5 Pa. Super. Ct. 242 (1897). The act of May 20, 1891, P. L. 96, is merely a repetition of what was vainly sought to be done by the act of June 20, 1881, and is unconstitutional, on the authority of *Godcharles v. Wigeman*, 113 Pa. 431. (See Vol. 1, page 769.)

Settlements made by a miner in which his bill of goods was applied in discharge and payment of his wages must be given the same effect as if he had made a contract to that end in advance.

Commonwealth v. Brown, 8 Pa. Super Ct. 339 (1898). The act of July 15, 1897, P. L. 286, which makes it a misdemeanor for the owner, lessee or

operator of any bituminous coal mine, "employing miners at bushel or ton rates or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the weight, value or quantity thereof," is unconstitutional. The intent of the legislature was to break up the existing system, and to substitute the weight of the unscreened coal for that of the screened coal as the basis upon which the miner's compensation was to be computed. It abridges the right of the parties to fix by their agreement the mode in which the wages of the miner shall be ascertained and computed, and puts upon the employer the burden of doing something which the parties did not see fit to require by their contract. "The general rule is, that private parties, able to contract and willing to contract, may freely make such contracts concerning their property or labor, not contrary to good morals or public policy, as they may deem for their best interests; the instances where the legislature may interfere to abridge or deny this valuable right are exceptional, and such interference must have some reason for their justification other than the mere judgment of the legislature that the contract is not for the best interests of one or the other of the parties to it." "The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be under the protection of the law."

B. *Lien and Preference.*

p. 771. And in addition to the statutes there cited and those cited in cases under this title, see Arkansas, Kirby's Dig. § 5359; Indiana, 3 Burns' Ann. St. 1908, § 8596; Iowa, Code 1897, § 3105; Minnesota, Rev. Laws of 1905, § 3520; Missouri, Rev. St. 1899, § 8792; Ohio, Gen. Code 1910, § 8309.

Alaska.

Cascaden v. Wimbish, 88 C. C. A. 277, 161 Fed. 241 (1908). 9th Circ. Under Civ. Code Alaska, §§ 262, 263 and 265, a laborer's lien binds the interest of the owner of a mining claim for work done thereon under the direction of a lessee with the owner's knowledge and in the absence of any disclaimer of responsibility by him. A laborer who is hired for a certain sum per day and board is entitled to a lien, although he devoted a part of his time to cooking for himself and the other laborers.

Work done in cleaning up and washing gold taken from a mining claim is "labor done upon the claim," within § 262.

Arizona.

Hadley Co. v. Cummings, 7 Ariz. 258, 64 Pac. 443 (1901). No lien can be sustained unless the labor for nonpayment of which the lien is claimed was performed at the instance or request of the owner of the property, or of an agent of his. Neither under the common law nor under par. 2276, Rev.

St. Ariz., is one whose relation is either that of equitable owner or of lessee to be considered the agent of the legal owner or of the lessor, so as to render the latter's interest liable to lien for work performed for the former.

Griffin v. Hurley, 7 Ariz. 399, 65 Pac. 147 (1901). Where a person has done work for the lessee of a mine and has not been paid therefor, he is not entitled to file such a lien against the mine as in any way will affect the interest of the owner of the mine, unless the latter be directly or by agency connected with the debt. "It is quite common in Arizona for owners of mines or mining claims, who are not able to work and develop the mines themselves, to lease their mining property to some one who is willing and able to work and develop it, which process comes within the common appellation of 'chloriding' and in many parts of the territory chloriding is a settled industry, furnishing employment and profit to thousands of miners. Such chloriding contracts or leases have not in view either the improvement of the mine or its depletion, but only the operation of the mine for immediate profits, the same as the owner of a farm may lease his land to be cultivated, the lessee paying therefor as rent either money or a portion of the products. In such operation a mine may be improved,—it may be developed into a bonanza,—or it may be worked out and depleted. To hold that one who has leased a mine and takes the bulk of the proceeds, paying the owner of the mine but a share of the profits as rental, can so operate the mine that the miners working for him can file liens against any other interest in the mine than that which the lessee holds, would be destructive of the owner's rights."

Bogan v. Roy, 10 Ariz. 237, 86 Pac. 13 (1906). Plaintiff contracted with X. for the sale of certain mining land, the deed to remain in escrow until final settlement. X. assigned the contract to Y., who entered into possession and employed defendants to perform certain work, which work was done with the knowledge and acquiescence of plaintiff. Defendants sued Y., and recovering judgment attempted to sell the entire mine, machinery, etc. The plaintiff sought by injunction to restrain such sale. Held that defendants had a lien against the interest of Y., but not against plaintiff's property. To entitle them to a lien against plaintiff's interest, the facts must be such as to constitute Y. an agent, either in fact or in law, of plaintiff. Mere knowledge on the part of plaintiff that Y. is working the property, or even permission or an agreement on plaintiff's part that Y. may work the property, will not constitute Y. an agent.

California.

Jurgenson v. Diller, 114 Cal. 491, 46 Pac. 610, 55 Am. St. Rep. 83 (1896). Section 1183, Code Civ. Proc., provides that any person performing labor on a mining claim shall have a lien thereon for his work, whether done at the instance of the owner or his agent; "and every contractor, subcontractor, architect, builder, or other person having charge of any mining
* * * shall be held to be the agent of the owner for the purpose of this chapter." It is held that this creates only a statutory presumption

of agency, and where a man, at the time he did the work in question, knew that the person in charge was not the owner of the mine and did not represent the owner, he has no right to a lien upon the mine for his work.

Hamilton v. Delhi Min. Co., 118 Cal. 148, 50 Pac. 378 (1897). Where several claims are owned and operated as one mine, as against the parties so uniting them, they may, for the purposes of the lien law in favor of laborers, be treated as a single claim and declared on as such. And though the ownership of the claims was several, and though there was no express authorization to one working them under contracts with the separate owners to work them as a consolidated claim, yet where the owners were cognizant of the fact that the property was being developed as a single mine or claim, and that the improvements and labor thereon, wherever placed, was with the purpose and effect of enhancing the value, not alone of the property as an entirety, but of each of the several locations embraced therein, the laborers' liens will cover all of such claims. Under such circumstances the owners come within the provisions of § 1192 of the Code of Civ. Proc., declaring subject to lien for improvements put on land the interest of the one who, knowing thereof, fails to post a notice that he will not be responsible for the work.

Hines v. Miller, 122 Cal. 517, 55 Pac. 401 (1898). He who engages in the construction of mining shafts, tunnels, levels, chutes, stopes, uprisers, crosscuts, inclines, etc., is engaged in mining within the meaning of the miner's lien law, and is entitled to file a mechanic's lien against the mine for such labor performed.

An owner will be deemed to have knowledge of the prosecution of work on a mine, under § 1192 of the Code of Civ. Proc., when he had entered into an agreement to sell the mine, the agreement granting to the vendee permission to enter into immediate possession thereof and proceed to work and develop the same, a stipulated part of the product taken from the mine to be paid to the owner and applied as a partial payment on the purchase price.

Jordan v. Myres, 126 Cal. 565, 58 Pac. 1061 (1899). Under § 1183, Code Civ. Proc., providing that any person performing labor on any mining claim has a lien upon the same and the works owned and used by the owners for reducing ores from such mining claim, for the work or labor done or materials furnished, the lien attaches to the property of the owner and not to the property of some other person. Therefore, such a lien could not attach to an engine and other machinery leased by the owner of a mining claim and affixed to the mine, with an option in the lessee to purchase. Nor need the owner and lessor of such machinery give notice of his interest therein, under § 1192, Code Civ. Proc.

Chappius v. Blankman, 128 Cal. 362, 60 Pac. 925 (1900). Breaking down and tearing away from the face of the drifts the quartz and substance of the mine constitutes work and labor performed "in the construction and alteration or repair of the mine," for which liens are allowed under §§ 1183-1192, Code Civ. Proc.

Where the persons performing such labor are hired by an agent of one in whose name the title to the mine is recorded, but who is in reality holding the mine in trust for an estate of which he is executor, they may nevertheless file liens against the mining property, being "encumbrancers for value" within the meaning of that phrase in § 856 of the Civil Code, which provides that "no implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of the real property for value, and without notice of the trust."

Reese v. Bald Mountain Consol. Min. Co., 133 Cal. 285, 65 Pac. 578 (1901). A person in possession of a mine under a contract with the owner which authorized him to occupy and hold possession of the premises, to make extensive improvements, and to prosecute development work and prospecting thereon and therein, is not an agent of the owner even under a statute (Code Civ. Proc. § 1183) providing that the following shall be held to be agents of the owner, viz., "every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, addition to, or repair" of any mining claim or works on it, and one doing work for such person, therefore, is not entitled to a miner's lien for unpaid wages. Nor is labor in a mine such a "building or improvement constructed upon lands" that knowledge thereof by the owner of the land, and a failure by him to deny responsibility therefor within three days after learning of it, makes him liable, whether the mining was done at his instance or not. (Code Civ. Proc. § 1192.)

Williams v. Hawley, 144 Cal. 97, 77 Pac. 762 (1904). Under Code Civ. Proc. § 1183, in relation to miners' liens the labor to be performed upon a mining claim and for which a lien is given, is labor performed in the course of the actual work of mining or development in the mining claim, and does not include the services of a watchman engaged in caring for the mine while it is lying idle.

A person not expressly authorized by the owner of the mine to act in his behalf cannot be held to be the constructive agent of such owner, under the statute, unless he is a person having charge of mining, as provided in the statute. This means that the person thus in charge of the mine shall be doing some work upon the mine itself, for the purpose of extracting ores therefrom. It is not sufficient to show that such person was in possession of the premises under a contract with the owner by which he was empowered to make improvements and prosecute development work thereon. He must be engaged in the actual work of mining, and the services contracted for by him must be services in aid of such mining, in order to constitute the person in charge of the mining the agent of the owner to contract for such services, and to give a lien therefor against the mining claim.

Castagnetto v. Coppertown Min. & Smelting Co., 146 Cal. 329, 80 Pac. 74 (1905). Code Civ. Proc. § 1187, requiring that a notice of a laborer's lien against mining claims shall state the name of the owner, or reputed owner, if known, and also the name of the person by whom he was employed, does not require the claimant to go beyond this and state further

the relation between the owner and the one in possession. The statute being substantially complied with, the authority of the employer to bind the owner is matter for proof at the trial.

The notice gives the "terms, time given and conditions of the contract" when it states that the labor was performed at so much per day, at an agreed price, between certain dates, and that the amount is justly due and owing.

"On that certain copper mine" is sufficient compliance with the requirement of the statute that the statement set forth that the labor was performed "in a mining claim". If the labor were not performed in the mining claim it could easily be so proven at the trial.

Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 Pac. 47, 113 Am. St. Rep. 308 (1906). Code Civ. Proc. §§ 1183-7 provide that "a miner working on a claim, or a mechanic erecting reduction works or other structures useful in connection with mining operations thereon, has a lien upon the entire claim for his wages or the value of his material." But (§ 1185) with respect to other lands the lien attaches only to the ground upon which the building or other structure stands, together with a convenient space about the same. A tract of land in process of development as an oil mine is a mining claim within the meaning of the lien law, and laborers thereon under contract with lessee have a lien upon lessee's entire interest therein.

Higgins v. Carlotta Gold Min. Co., 148 Cal. 700, 84 Pac. 758, 113 Am. St. Rep. 344 (1906). Under § 1183, Code Civ. Proc., any contractor, subcontractor, architect, builder or other person having charge of any mining, or of the construction, alteration, addition to or repair, either in whole or in part, of any building or other improvement, shall be held to be the agent of the owner for the purposes of this chapter. Hence, under a mining lease whereby the lessor was to share in the benefits of the work, the lessees were the agents of the lessor, and laborers performing work were entitled to claim a lien therefor against both lessor and lessees.

The liability of the lessor is for all work done, whether for work done exclusively in the extraction of ore and for that purpose only, or for work done for development to discover new and better ore, or to facilitate the extraction of ore, discovered or undiscovered, or for work which served to accomplish all these purposes.

Danaldson v. Orchard Crude Oil Co., 6 Cal. App. 641, 92 Pac. 1046 (1907). The services of a watchman of an idle mine is not such labor as, under Code Civ. Proc. § 1183, gives rise to a lien; but for services performed in pumping oil from the claim for use in an engine, there is a lien.

Colorado.

Maher v. Shull, 11 Colo. 322, 52 Pac. 1115 (1898). Where A., owning an interest in a mining claim, entered into an agreement with B. to sell him a share thereof provided he would within a certain time expend a certain sum upon it, and deposited a deed in escrow to be delivered upon full compliance with such agreement, B. cannot, until full compliance with such

agreement, confer the right to a lien upon persons whom he employs to do work upon such claim in pursuance of his agreement. "He is not the owner or reputed owner" of the claim, as required by the mechanics' lien laws of Colorado, nor does the court consider him under these facts as the agent of such owner.

Wilkins v. Abell, 26 Colo. 462, 58 Pac. 612 (1899). The lien created by § 8 of the Mechanic's Lien Act, as amended in 1895 (Sess. Laws 1895, p. 202), in favor of persons who shall do work or furnish material for the working, preservation, or development of mines, does not attach to and bind the interest or estate of the owner of a mine in favor of persons employed by one who has leased the mine from the owner, and at the time the employment was made and the work done, had no other interest in the property except that of a lessee.

Schweitzer v. Mansfield, 14 Colo. App. 236, 59 Pac. 843 (1900). Where the owner of a mining claim leases the property to others, who employ persons to work on the claim as miners, the latter cannot obtain a personal judgment against the owner for unpaid wages, nor can they file a mechanic's lien upon the property.

Little Valeria Min. & Mill. Co. v. Ingersoll, 14 Colo. App. 240, 59 Pac. 970 (1900). "Miners who work for lessees may not have a lien on the property of the lessor simply because they were hired by the lessee and worked on the property. There must be some showing to the point that the owner of the realty was in some manner obligated, either because he was a privy and party to the contract of employment, or because, in some other way than by the lease, he authorized the lessee to contract, or because the agreement, by its terms, gave the lessee authority."

Davidson v. Jennings, 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340 (1900). "A mechanic's or miner's lien is the creature of the statute, and attaches only by virtue of work being done or materials furnished under a contract, express or implied, with the owner of the property upon which the lien is claimed, and the burden of proving such contract rests upon the party asserting it: and he must ascertain for himself that the party with whom he deals holds such a relation to the work being done, and the property upon which the same is done, as will entitle him to claim a lien for the work or material which he furnishes." Therefore, even though one has an interest in a mine, and is cognizant of work being done thereon by the plaintiff, and to some extent (as bookkeeper for the lessees operating the mine) takes part in its direction, and fails to notify the plaintiff of his real relation to those operating the mine, his interest in the mine is nevertheless not subject to a lien by the plaintiff, where he was not actually a party to the plaintiff's contract with the lessees operating the mine, and the lease of those operating the mine was publicly recorded.

Morrell Hardware Co. v. Princess Gold Min. Co., 16 Colo. App. 54, 63 Pac. 807 (1901). The mechanic's lien law of the state does not allow a lien to attach against the interest of the owner in mining premises in favor of parties doing work upon or furnishing materials for the mine by contract with persons working the property under lease.

Lindemann v. Belden Consol. Min. & Mill. Co., 16 Colo. App. 343, 65 Pac. 403 (1901). Section 8 of the amendment of 1895 (Laws 1895, p. 202) gives the right to a lien on mines to such persons as shall do work or furnish material for the working, preservation, or development of the property, or upon any shaft, tunnel, incline, adit, drift, or draining of a mine, lode or deposit. Held that a geologist and mining expert employed to explore, examine and consider mines with reference to their mineral character, and their value and capacity as mining claims, and to report the same to his employer, the expert's fee to be contingent on a contemplated sale of the mine, was not entitled to a lien thereon. "The services and report were not made with any view to the development, preservation, or working of the mine, and could not have been used for that purpose, but they were made only for the use of McDonald (the employer) in attempting to make a sale of the property." A contrary holding would destroy the business of buying and selling mines, for it would leave them subject to liens not recorded and not arising from the doing of any work visible on the ground.

Idaho.

Idaho Gold Min. Co. v. Winchell, 6 Idaho, 729, 59 Pac. 533, 96 Am. St. Rep. 290 (1899). Where one unlawfully ousts the owner from mining claims, and in working the same creates debts, such debts may not be made the basis of liens against the mining claims under the provisions of Sess. Laws Idaho 1893, § 1, p. 49.

Phillips v. Salmon River Min. & Development Co., 9 Idaho, 149, 72 Pac. 886 (1903). Where work is being done upon a group of placer mining claims owned by the same person or corporation, which are commonly known as the "Salem Bar Mine", and one does work thereon, and thereafter files his claim of lien, and in such claim the mines are designated as the "Salem Bar Mines", with a description of the place of location of said mines, such description is sufficient.

Under the provisions of § 7 of the lien laws (Sess. Laws 1899, p. 148), when work is done upon two or more mining claims owned by the same person, the only effect of failing to specify in the claim of lien the amount due on each claim is to postpone such lien to other liens filed against them.

Thompson v. Wise Boy Min. & Mill. Co., 9 Idaho, 363, 74 Pac. 958 (1903). Where a person performs labor in a quartz mill located upon and belonging to a mine under employment by the owners, and such labor consists in working "as an amalgamator, attending to putting silver into batteries, dressing plates, keeping the machinery in running order, looking after the concentrates, and adjusting them and putting them in shape to run, cleaning amalgam, looking after the rock breaker, and generally looking after the entire machinery," he is entitled to a lien on the mine for such labor under the lien laws of this state. Where the ore extracted from the mine is milled upon the mine, and in a mill belonging to the mine, the labor thereon comes within the intent and meaning of the lien laws, and a lien therefor is properly allowed.

Idaho Min. & Mill. Co. v. Davis, 59 C. C. A. 200, 123 Fed. 396 (1903), 9th Circ. The statutes giving liens to laborers and mechanics for their work (Idaho Sess. Laws 1893, p. 49, and Sess. Laws 1895, p. 48) are liberally construed. One who is employed as a foreman, and later as a watchman and caretaker of a mine, is entitled to a lien for his services, his position with respect to the mine not being professional or supervisory to the degree that would preclude him from the benefits of a lien. Nor does the fact that it is not shown that he had ceased to perform such duties at the time of filing his claim of lien invalidate his claim.

Where several claims or locations are owned and operated as one mine, as against the parties so uniting them, they may, for the purpose of the lien law, be regarded and treated as a single claim, and declared on as such. Under § 7 of Sess. Laws 1893, p. 51, the failure of a plaintiff, who has claims against two or more mines owned by the same person, to specify in his claim of lien the amount due on each claim, would only postpone such lien to other specific liens, but would not invalidate it.

Illinois.

Borders v. Uhe, 88 Ill. App. 634 (1900). Under § 44, c. 93, Hurd's St., a lien is given only for labor in "opening and developing a mine." Such labor might consist of sinking shafts, constructing slopes or drifts, mining coal or the like," but to entitle the laborer to a lien such labor is restricted to "opening and developing" the mine. A miner who digs coal in the mine after it was opened and developed is not entitled to a lien.

Traylor v. Barry, 96 Ill. App. 644 (1901). Where the court appoints a receiver to take possession of and operate a coal mine, employing therefor all necessary agents and employes, the receiver has authority to employ persons to operate and improve the mine, in order to preserve it, and to agree to pay them therefor out of the moneys made from such operating, and in case it was not sufficient, then the effect would be to bind the mining plant with the lien given therefor by the act of 1895 (Laws of 1895, 242), which provided that every laborer or miner who shall perform labor in opening and developing any coal mine shall have a lien upon all the property of the operator used in the construction or operation thereof for the value of such labor.

Iowa.

Mitchell v. Burcell, 110 Iowa, 10, 81 N. W. 193 (1899). Under § 3105 of the Code, which provides that "every laborer or miner, who shall perform labor in opening, developing and operating any coal mine, shall have a lien on all the property of the person, firm or corporation owning or operating such mine, and used in the construction or operation thereof, including real estate and personal property, for the value of such labor, to the full amount thereof," one who performed labor in and about a mine at the instance of the lessee who was operating the mine is entitled to a

lien against the mine and all improvements therein, including those made by the lessee, notwithstanding the fact that the lease from the owner to the lessee had provided that all improvements added by the lessee should not be removed until the owner had had an opportunity and reasonable time to purchase the same, and notwithstanding the additional fact that the lessee was indebted to the owner for unpaid royalties due under the lease. Owners of mines who lease them do so charged with knowledge of the statute, which, to some extent, enters into and becomes a part of the contract. "It will be observed that the lien established by the court, although, on all of the land as well as the mine and personal property, was limited to the amount which the property had been increased in value by the improvements made by the lessees. We have no occasion to decide the rights of miners and others who perform labor for a lessee who added nothing, by improvements or otherwise, to the value of the leased premises, but merely diminished their value by removing coal therefrom. In such a case it would be a hardship, no doubt, for the owner to be compelled to pay the wages of the laborer in operating the mine, perhaps to lose his royalty, and then to receive back the leased property at a diminished value. But that is not the case before us."

Caster v. McClellan, 132 Iowa, 502, 109 N. W. 1020 (1906). In § 3105 of the Code, quoted above, the word "or" does not mean "and"; hence the act does not give a lien on mining property of an owner in favor of the employe of an operating lessee. This is not in conflict with the decision in *Mitchell v. Burwell*. In that case "the holding went no farther than to declare for a lien in favor of the miner upon a mining property to the extent of the value of the improvements made on the mine by the operating lessee thereof."

Kansas.

Eastern Ohio Oil Co. v. McEvoy, 75 Kan. 515, 89 Pac. 1048 (1907). See this case on page 96.

Michigan.

Atlantic Dynamite Co. v. Ropes Gold & Silver Co., 119 Mich. 260, 77 N. W. 938 (1899). Section 8408, How. Ann. St., provides that persons performing labor for certain mining corporations shall have a lien for the amount due for such labor, which lien shall have preference of all other liens or mortgages against such corporations, except tax liens. Held that the labor liens had priority over mortgage liens though they did not accrue before the mortgages became liens.

M. C. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co., 132 Mich. 285, 93 N. W. 611 (1903). Liens filed under Comp. Laws 1897, § 5472 (which is not repealed by Pub. Acts 1897, No. 113), which provides that persons performing labor or furnishing material to foreign mining corporations doing business within the state shall have a first lien, are concurrent with liens filed under Comp. Laws 1897, § 10, 755, which allows liens to persons performing labor or furnishing material to any mining corporations.

Where there are two mechanics' or miners' liens on the property, and the holder of one of them purchases the property subject to such liens, there will be no merger presumed, the effect of which would be to give the other lien priority.

Nevada.

Salt Lake Hardware Co. v. Chainman Min. & Elec. Co., 137 Fed. 632 (1905). C. C. D. Nev. The Nevada Mechanic's Lien Law (Cutt. Comp. Laws, § 3881 et seq.) provides that every person performing labor upon or furnishing material in the construction of any building or other superstructure to be used in or about a mine shall have a lien upon the mine for the amount and value of the work and labor so performed, or material furnished, and also that the land occupied by any building or other superstructure, together with a convenient space about the same, or so much as may be required for the use and occupation thereof, is also subject to the lien. The contractor for a mill erected for the purpose of working the ores to be extracted from a group of mines, where the success of the mill and of the mine were dependent upon each other, and to that extent the group were bound together for a common purpose, has a lien upon the entire group, but he is not entitled to a lien covering an electric power plant situate two miles from the mine on land not connected therewith.

New Mexico.

Boyle v. Mountain Key Min. Co., 9 N. M. 237, 50 Pac. 347 (1897). The general manager and superintendent of a mine is not within the protection of statutes conferring the right to a lien on certain classes of laborers and workmen. "If not absolutely a part of the company, as a member, he was its authorized agent to act for it in every capacity essential to the development of its property and the realization of profits; and to permit him to utilize his position to procure a preference over the laborers he employed and controlled would frustrate the object of the statute, and promote oppressive injustice."

Post v. Fleming, 10 N. M. 476, 62 Pac. 1087 (1900). Where one co-owner of a mining claim authorizes his co-owner and others to place mining machinery upon their claims and to do mining thereon, and the foreman in charge of such mining employs laborers to work upon such claims, who perform labor thereon, of which facts such co-owners have notice, and fail to post the notice provided for in § 2226, Comp. Laws 1897, such laborers are entitled to a lien upon the entire claim or claims, and may file and foreclose a lien for the value of the labor performed thereon.

Under such circumstances, the foreman in charge of the mining done upon such claim is the agent of the owners thereof, under § 2217, Comp. Laws 1897, notwithstanding such foreman was employed by one of the co-owners.

A lien filed against several mining claims is not void because the amounts against each claim are not segregated in the lien, but, where other liens exist at the time, such lien is postponed to other valid liens.

Oregon.

Stinson v. Hardy, 27 Or. 584, 41 Pac. 116 (1895). A. having conveyed certain property to B. by deed in escrow, pending the performance of the condition thereof, viz., the payment of the purchase money, they entered into an indenture whereby A. delivered into the possession of B. the premises, being mining claims, with power to work the mines for a period of about 14 months, and power to apply the proceeds to the payment of the purchase money. The instrument is styled a lease and contains covenants as to manner of working, etc.

The act of Feb. 20, 1891, securing liens of miners, etc., contains a proviso that it shall not apply to owners of mines "when the same shall be worked by a lessee or lessees."

After discussing the distinction between a license and a lease at considerable length, the court concludes that "whether technically construed as a lease or a license, the mine owners parted with their entire supervision and control of the mines for the stipulated time," and "where as in this case the licensee has acquired a license which by its terms is made exclusive and irrevocable, and which by reason of his expenditures in the development and improvement of the mines has become a license coupled with an interest, under which possession may be maintained against the grantor and all other persons, such a license amounts to a lease within the spirit and purview of the statute."

Burns v. White Swan Min. Co., 35 Or. 305, 57 Pac. 637 (1899). The act of Feb. 20, 1891 (Laws 1891, p. 76), provides that the liens thereby created shall not bind the mine upon which the labor is performed for a longer period than six months after the claims therefor shall have been filed, unless within that time a suit be brought for their foreclosure. The provisions of the general statute of limitations (1 Hill's Ann. Laws, § 16) that the statute shall not run in favor of a defendant who is not within the jurisdiction at the time the cause of action accrues, or who subsequently departs therefrom, do not apply as a qualification to the aforesaid miner's lien law.

The filing of the complaint is the commencement of the suit within the meaning of the miner's lien act.

Lewis v. Beeman, 46 Or. 311, 80 Pac. 417 (1905). "The purpose of the statute (B. & C. Comp. § 5668), in requiring persons personally liable for the payment of the labor performed in operating and developing a mine to be made parties to a suit to foreclose a miner's lien, was evidently not designed to exempt the property from liability for the work done, but to enable the owner of the mine, if compelled to pay the sums decreed to be

a lien upon it, to have a judgment over against the lessee, which he could enforce without instituting another suit therefor. The statutory requirement of making persons parties who are personally liable, which was enacted for the benefit of the mine owner, is not one in the enforcement of which the public has an interest, and therefore such owner can waive the advantage which the law confers. This he does when he fails to demand that the persons personally liable shall be brought in for his protection."

Where the lessor's property is to be subjected to the payment of debts contracted by the lessees, the burden is imposed on the lien claimants of showing that no payment had been made on account of their liens since they were filed.

Slover v. Bailey, 49 Or. 426, 90 Pac. 665 (1907). The statute authorizing liens on mines in favor of laborers and materialmen (B. & C. Comp. § 5668) provides that it shall not apply to the owner or owners when the mine is worked by a lessee, if a copy of the lease is recorded in the "mining records" of the county before the work is begun. The law does not define mining records or prescribe of what they shall consist. Held, where the book in which a particular instrument shall be recorded is prescribed by law, it must be recorded in such book; but when no particular book is designated, recording it in any book kept by the officer for that purpose is sufficient. Hence the record of a mining lease in a book kept by the county clerk for the recording of leases and instruments affecting the title to mining claims, designated "mining conveyances", constituted a full compliance with the act.

Durkheimer v. Copperopolis Copper Co., 104 Pac. 895 (1909). A superintendent and manager of a mine is not entitled to a lien for his wages under § 5668, B. & C. Comp., as amended by Sess. Laws 1907, p. 294. "We are of opinion that the words 'every persons who shall perform labor' used in the statute are designed to designate ordinary laborers who perform actual physical toil, common laborers and those who are required to use their hands or muscles in actual work, and do not include that higher and usually better paid class of employes whose duties are confined to superintendence and management unless such class is expressly mentioned in the statute."

The above section originally gave a lien to persons working in a boarding house used in connection with a mine, but this provision was omitted in the amendment of 1907, and such persons consequently have no lien.

South Dakota.

Sutton v. Consolidated Apex Min. Co., 15 S. D. 410, 89 N. W. 1020 (1902). The amendment to the miner's lien law made in 1895 (Laws 1895, c. 134) does not impair the obligation of mortgage contracts by postponing their lien to miner's liens filed after such mortgages were recorded, where the work for which the miner's liens are filed was performed prior to the execution of the mortgages and the liens date from the time of the performance of such work.

A person who performs work for a mining company, and negotiates for it a mortgage without informing the mortgagees that he intends to file a miner's lien for his services, is not estopped from claiming priority of such lien over such mortgages, if it is not shown that the mortgagees were in any manner misled to their prejudice by the conduct or acts of such person.

Utah.

Park City Meat Co. v. Comstock Silver Min. Co., 103 Pac. 254 (1909). Comp. Laws 1907, § 1381, creates a lien for work and material applied to the preservation or development of any lode, mine or mining claim, "provided that when two or more such lodes or deposits, owned or claimed by the same person or persons, or where the owners are different persons, and the same with the consent of all shall be worked through a common shaft, etc., then all the mine, lode, or deposit so worked shall, for the purpose of this chapter, be deemed one mine." Held, to acquire a mechanic's lien under the proviso, the claims constituting the mine and all the property necessarily used and connected with the mine and mining claims, including an easement on adjoining lands, a necessary appurtenance to the mine, must be regarded as a unit, to all of which the lien attaches. A notice of intention to claim a lien for work on a mill on several mining claims operated as a mine need only describe the mine as a whole, or refer to the claims by name and number, without referring to an easement in adjoining lands, a necessary appurtenance to the mine.

II. HEALTH AND SAFETY OF MINERS.

p. 780. And in addition to the statutes there cited, see Alabama, Code 1907, §§ 999-1007, 1014-1038, 7418; Arkansas, Kirby's Dig. §§ 5337-5354, Act March 8, 1907, p. 162, Act March 9, 1907, p. 168; Indiana, 3 Burns' Ann. St. 1908, §§ 8569-8598, 8602-8624, 9056-61; Iowa, Code 1897, §§ 2478-2495; Act March 25, 1902, c. 98, Act March 25, 1902, c. 99, Act April 11, 1902, c. 100, Act April 12, 1907, c. 130; Kansas, Dassel's Gen. St. 1905, §§ 4312-4351, 4358-4360, Act February 21, 1907, c. 247, Act March 5, 1907, c. 250, Act Feb. 27, 1907, c. 251; Kentucky, Russell St. 1909, §§ 2456-2489, Act March 21, 1910, c. 48, p. 160; Michigan, Acts May 13, 1897, p. 140, May 2, 1899, p. 93, May 20, 1903, p. 147, May 10, 1905, p. 142; Minnesota, Act April 13, 1905, c. 166, p. 208; North Carolina, Revisal of 1905, §§ 3797, 4931-4952; Ohio, Gen. Code 1910, §§ 898-978; Pennsylvania, Acts April 20, 1899, P. L. 65, April 28, 1899, P. L. 88, May 29, 1901, P. L. 342, June 8, 1901, P. L. 540,

April 14, 1903, P. L. 180, May 13, 1903, P. L. 359, May 2, 1905, P. L. 344, May 3, 1905, P. L. 393, May 1, 1909, P. L. 375; Washington, Rem. & Bal. Code 1910, §§ 7372-7405; West Virginia, Code 1906, §§ 400-429, Act Feb. 27, 1907, c. 78, p. 314; Wyoming, Rev. St. 1899, §§ 2562-2589, Acts Feb. 18, 1903, Feb. 13, 1909, March 16, 1909.

United States.

Holden v. Hardy, 169 U. S. 366, 42 Law. Ed. 780 (1898), affirming 14 Utah, 71, 46 Pac. 756, and *State v. Holden*, 14 Utah, 96, 46 Pac. 1105. The act of March 30, 1896, c. 72, of Utah, limiting the period of employment of workingmen in underground mines to eight hours per day except in cases of emergency where life or property is in imminent danger, does not violate the provisions of the fourteenth amendment. It is a valid exercise of the police power for the protection of the health of citizens. "The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts." "We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them, that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employes, and there are reasonable grounds for believing that such determination is supported by the facts."

St. Louis Consol. Coal Co., v. Illinois, 185 U. S. 203, 46 Law. Ed. 872 (1902), affirming *Consolidated Coal Co. v. People*, 186 Ill. 134, 57 N. E. 880, 56 L. R. A. 266. The Illinois act of May 28, 1879, subsequently incorporated in Rev. St. 1895, and amended in 1897, Hurd's St. 1897, p. 1088, c. 93, is not in conflict with the fourteenth amendment. It is within the police power of the state to provide for the appointment of inspectors of mines and the payment of their fees by the owners of mines. The act is not rendered unconstitutional by reason of its limitation to mines where more than five men are employed at any one time, nor because it vests in the inspectors a discretion as to the number of inspections to be made, nor because the fees for each inspection are fixed by the inspector, the maximum and minimum only being fixed by the act.

Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708 (1907). The Illinois mining act of April 18, 1899, required the employment of licensed mine managers and mine examiners only, and imposed upon the mine owner liability for the willful failure of the manager and examiner to furnish a reasonably safe place for the workmen. This act does not

conflict with the fourteenth amendment to the federal constitution. "In legal effect, duties are imposed upon the mine owner, customarily performed for him by certain employes, duties which substantially relate to the furnishing of a reasonably safe place for the workmen. The subject was one peculiarly within the police power of the State, and the enactment of the regulations counted upon we think was an appropriate exercise of such power. The use and enjoyment of mining property being subject to the reasonable exercise of the police power of the State, certainly the rights, privileges and immunities of a mine owner as a citizen of the United States were not invaded by the regulations in question, and the imposition of liability upon the owner for the violation of such regulations being an appropriate exercise of the police power, was not wanting in due process. And even although the liability imposed upon the mine owner to respond in damages for the willful failure of the mine manager and mine examiner to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant, it being competent for the State to change and modify those principles in accord with its conceptions of public policy, we cannot infer that the selection of mine owners as a class upon which to impose the liability in question was purely arbitrary and without reason. And the views just expressed also adequately dispose of the contention that by the statute the mine owner was denied the equal protection of the laws."

Alabama.

Howell's Min. Co. v. Grey, 148 Ala. 535, 42 So. 448 (1906). One ground opening in a mine divided by a thin wooden partition into two separate and distinct compartments, there being no escapeway other than through one of these compartments, is not a compliance with the statutory enactment that coal mines shall "have and maintain at least two available openings to the surface from each seam or stratum of the coal worked in such mine, one of said openings to be known as a manway or escapeway in case of accident."

Sloss-Sheffield Steel & Iron Co. v. Green, 159 Ala. 178, 49 So. 301 (1909). Code 1907, § 1021, requiring operators of coal mines to keep a sufficient supply of props used in the mines, so that the workmen may be able to prop their working places, does not require the miners to prop or look after the safety of entries, but that duty rests on the operator.

Smith v. Woolf, 160 Ala. 644, 49 So. 395 (1909). Code 1896, § 2917, requiring mine operators to keep at the mine stretchers, blankets, bandages, etc., operates on all coal mine operators, and creates a legitimate class based on reasonable grounds. It is not invalid as class legislation, because coal mine operators are thereby distinguished from ore mine operators.

Arkansas.

Western Coal & Min. Co. v. Jones, 75 Ark. 76, 87 S. W. 440 (1905). Kirby's Dig. § 5340 defines the amount and measure of the ventilation of mines, and requires that so much air "shall be circulated to the face of every working place throughout the mine, so that said mines shall be free from standing gas of whatever kind." This means that the air shall be carried to the extremest point where the pick falls and that the entire mine shall be free of gas.

California.

Manning v. App Consol. Gold Min. Co., 149 Cal. 35, 84 Pac. 657 (1906). Section 4 of the Act of 1893, for the protection of miners, requiring that all timbers, tools, etc., longer than the depth of the bucket to be hoisted or lowered, must be securely lashed at the upper end of the cable, cannot reasonably be construed as imposing a personal liability upon any employer to do the lashing, if he furnishes the necessary lashing material to servants whose duty it is to adjust the material furnished.

Colorado.

Mollie Gibson Consol. Min. & Mill. Co. v. Sharp, 23 Colo. 259, 47 Pac. 266 (1896). The Damage Act of 1877 (M. A. S. 1003 et seq.) is constitutional. It was contested on the ground that its title did not meet the requirements of the constitution.

Illinois.

Chicago W. & V. Coal Co. v. People, 181 Ill. 270, 54 N. E. 961, 48 L. R. A. 554 (1899); *Consolidated Coal Co. v. People*, 186 Ill. 134, 57 N. E. 880, 56 L. R. A. 266 (1900). The acts of July 1, 1895, and July, 1897 (Hurd's St. 1897, p. 1088), which require the owners and operators of coal mines to pay to the state the fees of the state mine inspectors for inspecting the mines as provided by those statutes, are constitutional exercises of the legislative power.

Starne v. People, 222 Ill. 189, 78 N. E. 61, 113 Am. St. Rep. 389 (1906). The constitution of Illinois empowers the legislature to enact laws for the protection of operative miners by providing for ventilation, the construction of escapement shafts, and such other appliances as may secure safety in mines. The Act of 1903 made it the duty of operators in coal mines to provide a washroom at the top of each mine for the use of miners, so arranged that they might hang their clothes there for the purpose of drying them. This act was held unconstitutional, as it places upon mine owners a burden not borne by other employers of labor, it discriminates in favor of miners, and is special legislation.

Cox v. Mount Olive & Staunton Coal Co., 127 Ill. App. 24 (1906). The mines and miner's act defines a "shaft" to be "any vertical opening through

the strata which is or may be used for purposes of ventilation or escape-ment, or for the hoisting or lowering of men and material in connection with the mining of coal." This does not include a hole in the ground in process of completion as a shaft, but not yet so completed that it can be used for any of said purposes. Those sections of the act requiring certain protections to shafts do not apply in such a case.

Spring Valley Coal Co. v. Greig, 226 Ill. 511, 80 N. E. 1042 (1907). A hoisting engine erected at the top of an incline outside of a mine is a part of a mine, as defined by Hurd's St. 1905, § 34, p. 1394. "Mine" means "any and all parts of the property of a mining plant, on the surface or underground, which contribute directly or indirectly, under one management, to the mining or handling of the coal." Therefore the duty of inspection and examination imposed by the statute is not limited to the shafts and parts of the mine underground, but includes machinery, etc., used to remove minerals, and on the outside of the mine.

The law requiring examinations to be made by licensed mine examiners is not complied with by cursory examinations by any one else.

Springfield Coal Min. Co. v. Gedutis, 227 Ill. 9, 81 N. E. 9 (1907). Under § 16 of the Miners' Act of 1905, the miner is the judge as to the length and dimensions of the props and cap pieces needed to secure the roof; and the owner or operator has failed to comply with the statute if he furnishes anything else, or if he only furnishes props and cap pieces, where cross bars also are requested.

Eldorado Coal & Coke Co. v. Sican, 227 Ill. 586, 81 N. E. 691 (1907). Section 28, Miners' Act 1905, requires mine operators to maintain good and sufficient light at the bottom of every shaft as long as there are men employed underground "so that persons coming to the bottom may clearly discern the cage and objects in the vicinity." The existence of smoke at the bottom is a condition necessarily connected with the operation of the mine, and the operator is required to take this condition into account in providing the light which the statute requires. This circumstance in no way tends to lessen the operator's obligation to comply with the law; and if by reason of the smoke a small light was insufficient, it was the operator's duty to provide a larger one.

Section 33, Miner's Act, provides a penalty for any "willful violation of this act." The construction of "willful" here is "conscious"; and the questions of the existence or nonexistence of good faith, or the presence or absence of an intention to comply with the statute on the part of the operator, are not involved. The only question is as to the sufficiency of the light, a question for the jury.

Donk Bros. Coal & Coke Co. v. Sapp, 133 Ill. App. 92 (1907). Under the mines and miner's act "the upper and lower landings, at the top of each shaft and the opening of each intermediate seam from or to the shaft, shall be kept clear and free from loose materials and shall be securely fenced with automatic or other gates, so as to prevent either men or materials from falling into the shaft." Held, "The legislature intended that the lower landing at the top of every mine shaft shall be securely

fenced with automatic gates or some other kind of gate not automatic, and such gates, when so used, whether automatic or non-automatic, would fulfill the requirements of the statute, if they were reasonably adapted for the purpose for which they were required, that is to prevent either men or materials from falling into the shaft."

Schlapp v. McLean County Coal Co., 138 Ill. App. 1 (1907). Clause b, § 21, mines and miner's act, requires that "on all hauling roads or gangways on which the hauling is done by draft animals, or gangways whereon men have to pass to and from their work, places of refuge must be cut." Held, this act requires that every hauling road in mines shall be furnished with places of refuge.

Dunham v. Black Diamond Coal Co., 239 Ill. 457, 88 N. E. 216 (1909). The provisions of the mines and miner's act that no one shall enter a mine to work except under direction of the mine manager until "all conditions have been made safe," and that when "any dangerous condition" exists the mine manager shall place a conspicuous mark as notice for all persons to keep out, are broad enough to include dangerous conditions of a permanent character due to faulty construction, as well as the temporary ones due to operation; and the presence in the mine entry of a live, uninsulated electric wire, so placed that it may come in contact with a mule or its driver passing along the entry and thereby cause an injury to the driver, is a "dangerous condition" within the act. The words "any dangerous condition" do not, under the doctrine of ejusdem generis, limit the dangerous conditions to those expressly specified in the act and to those of the same kind as those so specified.

Indiana.

Maule Coal Co. v. Partenhimer, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710 (1899). The act of March 2, 1891, p. 57, which is entitled: "An act regulating the weighing of coal, providing for the safety of employes, protecting persons and property injured, providing for the proper ventilation of mines, prohibiting boys and females from working in mines," etc., is constitutional. It does not violate the constitutional provision that "every act shall embrace but one subject; and matters properly connected therewith." The act has one principal or general subject, viz., coal mines.

Chandler Coal Co. v. Sams, 170 Ind. 623, 85 N. E. 341 (1908). Act 1905, p. 65, c. 5, § 7, requires that two lamps shall be lighted at all times when the mine is in operation "except when electric lights are used", one on each side of the shaft, in each vein where men get on and off the cages. Held not void as an unwarranted discrimination against coal mines in which electric lights are not used. The sole purpose is to provide light and it does not require a needless expenditure to accomplish this. Nor is the act void because (§ 20) it provides that it shall not apply to mines operating less than ten men.

Hewitt v. State, 171 Ind. 283, 86 N. E. 63 (1908). Act 1907, p. 193, c. 121, requires the "owner, operator, lessee, superintendent of or other

person in charge of" every coal mine, to provide washrooms for employes at their request. This is directed against the person in actual charge of the mine, whatever may be his office or relation to the business, and an indictment charging a superintendent or any other person with violation of the act unless said indictment recites that the person was in charge of the mine is defective.

State v. Barrett, 87 N. E. 7 (1909). Laws of 1907, p. 334, c. 197, makes it unlawful for the owner, etc., of a coal mine to make an entry or track-way where drivers are required to drive with mine cars, unless there shall be a clear space of two feet on one or both sides of the rail, provided that the geological veins of coal Nos. 3 and 4, commonly known as the lower and upper veins in the block coal fields, shall be exempt from the provisions of the act. Held "the relation of the proviso to the enacting clause and the subject matter of each must make it quite manifest that the enacting clause was not intended to be operative as to any class of coal mining, unless the block coal fields were not embraced, and we must conclude that the act was intended to be applicable in its entirety so as to exclude the block fields or not at all."

In view of the hazard attached to mining in bituminous mines far below the surface as against that attached to mining in block coal fields at a much less depth, a regulation imposing the duty of making entries in the former a certain width and exempting the latter is not unconstitutional as embracing an arbitrary and unreasonable classification.

Iowa.

Fosburg v. Phillips Fuel Co., 93 Iowa, 54, 61 N. W. 400 (1894). Code, § 2456 (McClain's), does not require entries in mines to be propped with timber or other material.

Kansas.

Barrett v. Dessy, 78 Kan. 642, 97 Pac. 786 (1908). Under the provisions of § 4129 of the General Statutes of 1901, it is the duty of the overseer or mining boss employed by the owner of a coal mine to see that, as a miner advances his excavations therein, all loose work overhead is carefully secured against falling in upon the travelling ways.

In re Williams, 79 Kan. 212, 98 Pac. 777 (1908). Act 1907, p. 400, c. 250, forbids the sale or delivery of block powder for use at any coal mine except in original packages containing 12½ pounds and sealed. Held not in conflict with the state or federal constitution. Being enacted to protect mines, miners and mine laborers, it comes within the police power of the state, and not being a direct attempt to control interstate commerce, it is valid under the commerce clause of the federal constitution. "If the action of the State Legislature were a bona fide exercise of its police power and dictated by a genuine regard for the preservation of the public health and safety, such legislation would be respected, though it might interfere indirectly with interstate commerce." Nor is it in conflict with the four-

teenth amendment as abridging the right of contract, for the right of contract is always subject to the legislature's reasonable exercise of its right to protect the public health, morals and safety.

The mere fact that the act operates on coal mines alone is not unfair discrimination, "it being based upon such differences in situation as to be reasonable in view of the purpose to be accomplished, and if it tends fairly to accomplish that purpose it must be upheld.

Kentucky.

Sterns Coal Co. v. Evans' Adm'r, 33 Ky. Law R. 755, 111 S. W. 309 (1908). Section 2731 of the Kentucky Statutes provides in part that owners, agents or lessees of every coal mine must provide and maintain not less than a certain amount of ventilation therein. Held, "This and every statute intended for the protection of laborers engaged in the hazardous business of coal mining should be rigidly enforced, and mine owners held to the strictest accountability in the performance of these statutory duties."

Missouri.

State v. Murlin, 137 Mo. 297, 38 S. W. 923 (1897). An act of the legislature of Missouri (Laws 1895, p. 226) provides that "in all dry and dusty coal mines discharging light carbonated hydrogen gas, or mines where the coal is blasted off of the solid, shot firers must be employed to fire all shots after the employes and other persons have retired from the mine," and subjects an owner or agent to fine and imprisonment for violation of the act. The court holds it constitutional as a valid exercise of the police power and not a deprivation of property without due process of law.

Lenk v. Kansas & Texas Coal Co., 80 Mo. App. 374 (1899). Laws 1895, p. 227, requiring coal operators, under certain conditions, to drive two entries parallel for the ingress and egress of the air, and to make cross-cuts at intervals not to exceed fifty feet apart, etc., was intended to secure the circulation of air in coal mines, and under it coal operators are not required to keep such cross-cuts safe as places of passage or rest.

Hamman v. Central Coal & Coke Co., 156 Mo. 232, 56 S. W. 1091 (1900). Rev. St. 1889, § 7074, as amended by Act 1891, p. 182, providing that the widow and children of any one killed by the negligence of his employer while engaged at work in a mine are entitled to recover any sum not exceeding \$10,000 damages therefor, is constitutional. It does not violate the provision of the state constitution which forbids the passing of any local or special laws granting any special or exclusive right, privilege or immunity.

State v. Cantwell, 179 Mo. 245, 78 S. W. 569 (1904). The act of March 28, 1901, which restricts the employment of workingmen in mines to eight hours per day is constitutional.

Timson v. Manufacturers' Coal & Coke Co., 220 Mo. 580, 119 S. W. 565 (1909). Rev. St. 1899, § 8802, requiring inspection of mines, construed in connection with the sections of which it was a part when enacted, re-

ferred exclusively to coal mines, and the words therein "all mines generating gas" recognized that there were some coal mines not generating gas, meaning gas of such kind and in such quantity as to imperil life, so that, in a miner's action for injuries caused by a violation of that section, it must appear that the mine in question was one generating gas.

Montana.

State v. Livingstone Concrete Bldg. & Mfg. Co., 34 Mont. 570, 87 Pac. 980, 9 A. & E. Ann. Cas. 204 (1906). The act limiting the hours of labor of employes in underground mines, and in mills and smelters for the reduction of ores, to eight hours per day, is a valid exercise of the state's police power, and the equal protection of the laws guaranteed by the fourteenth amendment of the constitution of the United States is not thereby denied.

Nevada.

Ex parte Kair, 28 Nev. 127, 80 Pac. 463, 113 Am. St. Rep. 817, 6 A. & E. Ann. Cas. 893 (1905). The act of February 23, 1903 (St. 1903, p. 33, c. 10), imposing a penalty on any one working more than eight hours a day in any mine, smelter or mill for the reduction of ores, is not void under the Nevada Constitution (§ 1, art. 1, guaranteeing the right to acquire and possess property) nor under the eighth amendment of the federal constitution, but is sustainable as a valid health regulation under the police power, based on the fact of common knowledge that prolonged labor in such places is injurious. Nor is the act in conflict with the fourteenth amendment of the United States constitution.

New York.

Bacch v. North River Stone Co., 133 App. Div. 449, 118 N. Y. Supp. 29 (1909). The regulation of the commissioner of labor in regard to the use of explosives in mines and quarries, requiring the use of safety fuses, applies only when the blasts are exploded by fire; it has no application where the explosion is by electricity.

Ohio.

Morris Coal Co. v. Donley, 73 Ohio St. 298, 76 N. E. 945 (1906). Rev. St. § 6871, requiring miners to securely prop the roofs of working places under their control, is mandatory and cannot be deviated from for any reason, as, for instance, that the presence of props would render machine mining impracticable.

Pennsylvania.

Read v. Clearfield County, 12 Pa. Super. Ct. 419 (1900). The act of May 15, 1893, P. L. 52, "relating to bituminous coal mines, and providing for the lives, health, safety and welfare of persons employed therein," does

not offend the constitution in being either local or special legislation, nor in containing more than one subject. "The legislature has the right to classify the coal mining business in the way it has and to legislate for each class separately. The act under consideration is an exercise of the police power. So long as the right to classify exists, a law which bears upon all persons of the class is not a special law within the meaning of the constitution."

Rule 40 of article 20, which provides that if a person is injured in a coal mine, and the mine foreman shall be of opinion that he requires medical or surgical treatment, he shall see that such injured person receives the same, and if the latter is unable to pay therefor, the expense shall be borne by the county, is valid.

Commonwealth v. Schulte, 26 Pa. Super. Ct. 95 (1904). Section 2 of the act of May 13, 1903, P. L. 359, is unconstitutional. The title does not indicate the purpose expressed in that section. It proposes to amend a section of an act (June 30, 1885) not found in that act.

Commonwealth v. Shaleen, 215 Pa. 595, 64 Atl. 797 (1906), affirming 30 Pa. Super. Ct. 1. The act of July 15, 1897, P. L. 287, makes it a misdemeanor for anyone, except he first obtain a certificate of qualification from the miners' examining board and has been duly registered, to engage as a miner in any anthracite coal mine. As a qualification for examination and registration, the act requires that the applicant shall have had two years experience as a miner or mine laborer "in the mines of this commonwealth." This means anthracite mines, and as thus construed the act does not conflict with the provision of the federal constitution which guarantees equal privileges to the citizens of the several states.

"What the legislature had in view was the protection of the persons and lives of those employed in the anthracite mines of the state. The safety of those so engaged depends upon the intelligent understanding by each of those things which distinguish anthracite mines from all others, both in general design and the methods employed in working them. It will not be contended that experience even of a lifetime in an iron ore mine, or a zinc mine, would acquaint one in the slightest degree with the dangers that lurk in an anthracite coal mine. Whether experience in a bituminous mine would to any extent be helpful may be a question that admits of discussion; but the interpretation of the act that would admit the experienced bituminous miner, would admit as well every other kind of experienced miner, no matter whether he has ever seen a coal mine or not."

"The learned judge of the court below held that the act required as a qualification for registration two years' experience in the anthracite coal mines of the commonwealth, and in this view we concur. The Superior Court, while dissenting from this view, found other reasons justifying an affirmance of the judgment. These call for no consideration here."

Tennessee.

Iron Co. v. Pace, 101 Tenn. 476, 48 S. W. 232 (1898). Under clause 8 of c. 170, Acts 1881, providing for the employment and prescribing the

duties of a mining boss, there is a duty of inspection imposed upon the latter, not only in regard to obnoxious and explosive gases, but also to remove dust from the mine. He must keep a careful watch over all things appertaining to the safety of the mine, and every morning examine the mine to see that it is "free from all danger."

Wyoming.

State v. Thompson, 15 Wyo. 136, 87 Pac. 433 (1906). The statutes of Wyoming provide that eight hours shall constitute a day's work for all coal miners and laborers employed in any coal mine; that in all contracts between the owner, lessee or operator of any coal mine with any such miner or laborer for his services as such, the word day shall be construed to be eight hours; and that any "owner, lessee, or operator, his or its agents, employees, or servants violating any of the provisions of this chapter, shall be fined," etc. Held that the words "employees or servants" were not intended to and do not include miners and laborers employed in the mines, but that the persons designated by those words are that class of employees or servants who stand in the place of the owner, lessee or operator of the mine.

A miner or laborer who voluntarily works more than eight hours per day in a coal mine is therefore not punishable under the penal section of the statute.

Koppala v. State, 15 Wyo. 398, 89 Pac. 576, 93 Pac. 662 (1907). Section 7, Sess. Laws 1899, provides that "Any miner, workman or other person who shall intentionally injure any shaft, lamp, instrument, air course or brattice, or obstruct or throw open air ways, or carry lighted pipes or matches into places that are worked by safety lamps, or handle or disturb any part of the machinery, or open a door and not close it again, or enter any place of the mine against caution, or disobey any order given in carrying out the provisions of this chapter, or do any other act whereby the lives or health of persons or security of the mines or machinery is endangered, shall be deemed guilty of a misdemeanor," etc. Held to be constitutional. "There is nothing in the act but what is analogous to provisions contained in health laws and for the public safety, usually referred to as laws in the nature of police regulations, and in that sense there is no delegation of legislative power." "It simply makes it a misdemeanor to enter a mine or some part thereof under certain defined conditions, among which is to intentionally enter any part of the mine against caution whereby life or property is endangered. It is not the entering of some safe place of the mine in disobedience of an arbitrary order of the mining boss when neither life nor property would be endangered in so doing; but it is the intentional act of willfully and knowingly doing that which exposes life or property to danger that the law condemns." The statute "is a protection against unreasonable criminal accusations rather than the reverse.

since it exposes one to prosecution only upon the doing of an act after a specified notice of the danger attending it."

III. HEALTH AND SAFETY STATUTES IN THEIR RELATION TO THE LAW OF NEGLIGENCE.

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United States.

Sommer v. Carbon Hill Coal Co., 32 C. C. A. 156, 89 Fed. 54 (1898). 9th Cir. The Washington Act March 5, 1891, "is in effect the measure of that reasonable care which the owner or operator of a coal mine is required to take to avoid responsibility for injuries to workmen arising from accidents of this character. The general duty imposed by law upon the master is to provide a suitable and reasonably safe place for the doing of the work to be performed by the servant. What is a reasonably safe place is generally governed by the circumstances of each particular case; but here the law having regard to the hazardous nature of the employment has undertaken to provide adequate protection by imposing upon the master a specific duty which he must perform to escape the charge of negligence. It is a duty the object of which is to secure a reasonably safe place for the workmen in the mine and is a positive duty which cannot be delegated to a servant so as to exempt the master from liability for injuries caused to another servant by its omission."

The complaint is not demurrable on the ground of contributory negligence where it shows that plaintiff notified the person in charge of ventilation of the mine of the presence of gas, and afterwards, thinking that the place had been freed of gas, re-entered the chamber, lighted a match, and in consequence an explosion occurred.

Deserant v. Cerillos Coal R. Co., 178 U. S. 409, 44 Law. Ed. 1127 (1900), reversing *Cerillos Coal R. Co. v. Deserant*, 9 N. M. 49, 49 Pac. 807. The requirements of the act of Congress of March 3, 1891, as to ventilation, are imperative, and if they are neglected and injury results to an employe, the mine owner is liable. The fact that this neglect was concurrent with the negligence of a fellow-servant is not a defense to an action for damages by the injured employe or his representative.

Cole v. Mayne, 122 Fed. 836 (1901). C. C. W. D. Mo. Rev. St. Mo. 1899, § 8820, giving a right of action in the case of the death of a miner caused by the operator's violation of its provisions, does not give a joint cause of action to all the beneficiaries designated therein, but an exclusive cause of action to the parties designated, if living, in their order, viz., first to the widow, then to the lineal heirs or adopted children, and third, to any person or persons dependent for support on the decedent. If the widow is living, not divorced from the bonds of matrimony, she alone can bring the action, and it is immaterial that she had deserted her husband and was living with another person.

Under § 8822, no other duty is imposed upon the owner, agent, or operator of the mine than to keep on hand a sufficient supply of timber for props, and to send them down to the miner when required. It is the duty of the workmen to put the props in place, and to see that they are properly placed. Therefore, a petition which alleges merely that the defendant negligently failed to timber the mine, and that he failed to use care in timbering the same, is insufficient; there must, in order to constitute a cause of action, be an allegation that the defendant failed to keep on hand a sufficient supply of timber for props, or that he failed to send them down to the miner when required.

Cecil v. American Sheet Steel Co., 64 C. C. A. 72, 129 Fed. 542 (1904). 6th Circ. Where a statute (Rev. St. Ohio 1892, § 6871), providing that the owner or operator of a coal mine shall keep constantly on hand a sufficient supply of timber, does not declare or define the degree of care which he must exercise in that regard, it must be determined on common-law principles.

Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co., 130 Fed. 957 (1904). C. C. W. D. Mo. In an action by an employe against a mine operator for damages resulting from the latter's violation of the Illinois Statute, 4 Starr & C. Ann. St. 1902, c. 93, § 2b, requiring coal operators to cut safe passageways around the bottom of every shaft, there can be in Illinois no defense of contributory negligence or assumption of risk.

The fact that a passageway had been cut but had caved in again is no defense to such an action when it appears that the mine operator allowed it to remain in that condition for six weeks prior to the accident. Neither is it a defense that the mine was in its early and experimental stages of development.

Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708 (1907). Under the construction put upon the Illinois mining act of 1899 by the courts of that state, a mine manager and mine examiner are vice-principals of the owner, and are engaged in the performance of duties which he could not delegate to others in such manner as to relieve himself from responsibility.

Springfield Coal Min. Co. v. Gordon, 147 Fed. 690 (1906). 7th Circ. The Illinois act of April 18, 1899 (Laws 1899, p. 303), provides "that the upper and lower landings at the top of the shaft shall be securely fenced with automatic or other gates, so as to prevent either men or materials from falling into the shaft." The act gives a right of action for any injury caused by willful failure to comply with its provisions, and it has been held that the defenses of contributory negligence and assumption of risk do not lie to such actions. In this case an employe thrust his head through the fence into the shaft, and was struck by the cage and killed. Held the act had no application to such a case. Its purpose was to prevent men and materials from falling into the shaft. It does not require that the fence should be so tight as to prevent a man from thrusting his head into the shaft. If he does this, he has no right of action for the consequences of his act.

Bolen-Darnall C. Co. v. Williams, 90 C. C. A. 481, 164 Fed. 665 (1908). 8th Circ. Act of Congress of July 1, 1902, c. 1356, 32 Stat. 631, provides: "Wherever it is practicable to do so, the entries, rooms and all openings being operated in coal mines, shall be kept well dampened with water to cause the coal dust to settle," etc. "It being a disputed and open question among expert miners and in scientific treatises on the subject whether or not coal dust in a mine is inflammable, Congress, without determining such question, evidently intended by the foregoing enactment to minimize the danger from the presence of such accumulated dust by requiring its removal, or that the mine owner should keep it well dampened with water to cause the dust to settle; the thought doubtless being that the danger of ignition or the deleterious effect of such dust was to be apprehended from the particles being distributed in the atmosphere, and that this could be measurably prevented by dampening the deposits of such dust."

In an action for personal injuries, it was alleged that they were caused by the defendant's negligence in permitting accumulations of dust in the mine in violation of the statute, and the defendant introduced evidence that the mine was kept dampened with water. This raised an important issue and it was error for the court to ignore it in charging the jury.

Baldi v. Cedar Hill Coal & Coke Co., 97 C. C. A. 505, 173 Fed. 781 (1909). 8th Circ. Plaintiff, when injured, was engaged in removing coal, dirt and rock through a place which, when completed, was to be used as a passageway or entry. Being uncompleted, it was not yet a "traveling way" within the meaning of Colo. Laws 1885, p. 138, § 8, which made it the duty of the mining boss to see that all loose coal, slate and rock are carefully secured against falling in or upon the traveling ways. Under the statute, it was the duty of the mine owner to furnish the timber necessary to protect the roof from falling, but it was the duty of the miner to place them.

Alabama.

Wolf v. Smith, 149 Ala. 457, 42 So. 824, 9 L. R. A. (N. S.) 338 (1906). The laws of Alabama require that operators, agents or superintendents of mines, keep at the mouths thereof, or wherever designated by the mine inspector, stretchers properly constructed, and woolen and waterproof blankets in good condition "for use in carrying away any person who may be injured at the mines," a sufficient quantity of linseed or olive oil, bandages and linen. This is held to be valid as a regulation for the protection of the public welfare and comfort; and although no penalty is attached for failure to comply, the wrongdoer is liable in damages to the party injured by the violation of the statutory duty.

Alabama Consolidated Coal & Iron Co. v. Hammond, 156 Ala. 253, 47 So. 248 (1908). Under Employer's Liability Act, Code 1907, § 3910, subd. 1, making a master liable for injuries to his servants where such injuries are caused by reason of any defect in the condition of the "ways, works, etc.," connected with or used in the master's business, a wall of a stone quarry is a part of the "ways, works, etc.," within the meaning of the act.

Green v. Bessemer Coal, Iron & Land Co., 50 So. 289 (1909). Code 1907, § 1028, provides that approved safety catches shall be attached to the cage used for the purpose of hoisting and lowering persons into and out of mines. "There is no legislative requirement that cars operated upon a slope or inclined track, though used for the hoisting and lowering of persons, should be equipped with safety catches. We are not disposed toward a narrow construction of the statute, but we cannot ignore the fact that the duty imposed by it is enforceable by penal provisions (Code 1907, § 7418), and we are not authorized to extend its application to a case not falling fairly within its letter and spirit."

Arkansas.

Johnson v. Mammoth Vein Coal Co., 88 Ark. 243, 114 S. W. 722, 19 L. R. A. (N. S.) 646 (1908). Kirby's Dig. § 5352 requires the operator of a mine to keep timber when required for props and to deliver props when required at places where cars are delivered; this statute is imperative, and the company which fails to comply with it is guilty of negligence per se. Section 5350 gives a right of action to any person injured by its violation. But this is true only where the operator's negligence is the direct cause of injury; contributory negligence is a defense to a breach of this statutory duty. On the other hand, assumption of risk is not available as a defense in such a case.

Whether or not a miner, who after requesting props and being refused, but nevertheless continuing to work, was negligent, was for the jury.

Illinois.

Missouri & Illinois C. Co. v. Schwalb, 77 Ill. App. 593 (1898). Under § 14, c. 93, Rev. St. of Illinois, the plaintiff must prove a willful violation of the act, and that such willful violation was the principal and substantial cause of the injury. A failure to make an examination of the mine in the morning before the miners entered, even if willful, will not make the proprietors of the mine liable, if a subsequent examination is made in good faith before the accident complained of. Neither will such a failure to examine the mine render the proprietor liable, if the accident would have happened notwithstanding the making of such an examination.

Consolidated Coal Co. v. Seniger, 79 Ill. App. 456 (1898), affirmed 179 Ill. 370, 53 N. E. 733 (1909). The act of 1895 makes it unlawful for any one to assume the duties of a hoisting engineer at any coal mine in the state without first obtaining a certificate of qualification for the position from the state board of mine examiners; and mine owners and operators are prohibited from employing any person as hoisting engineer who has not such a certificate. Held that such a certificate was but prima facie evidence of competency, relieving the employer from the duty of enquiring into the competency of such an employe in the first instance. But if the employer should afterwards ascertain, either from personal observation or the reports of others, that the holder of the certificate was not com-

petent and should continue to retain him in service, he would be liable for all injuries to other employes resulting from such incompetency.

Consolidated Coal Co. v. Bokamp, 181 Ill. 9, 54 N. E. 567 (1899), affirming 75 Ill. App. 605. A mine owner is not absolved from all charge of negligence because he complies with the requirements of the statutes. The statute in Illinois which requires that the owner, agent, or operator of every coal mine shall keep "a supply of timber constantly on hand of sufficient length and dimensions to be used as props and cap-pieces, and shall deliver the same as required, with the miners' empty car, so that the workmen may at all times be able to properly secure said workings for their own safety," does not formulate a complete code of rules superseding the common-law obligation on the part of the mine owner to look after the roof, and to provide a reasonably safe place for the workmen.

Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131 (1899). In an action for injuries caused by a violation of Hurd's Rev. St. 1889, c. 93, § 3, in that the defendant, a coal-mining corporation, willfully failed to construct or maintain an escapement shaft, the defendant cannot set up as a defense an allegation of contributory negligence on the part of the plaintiff. "If one is injured as a result of some act of negligence on the part of the mine owner other than failure to comply with specific duties required by the statute, then the person injured must have been in the exercise of ordinary care before he can maintain an action, and must allege and prove that he was in the exercise of such care. The rule is different, however, under this legislation, where there is a willful failure to comply with the provisions of the statute, and the right of recovery cannot depend, in such case, on the exercise of ordinary care by the person injured, nor can he be precluded by mere contributory negligence."

Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N. E. 621 (1900), reversing 79 Ill. App. 469. Where an employe in a mine is injured as a result of the operator's willful violation of the provisions of the statutes relating to the management of mines, the plaintiff need not show that he was in the exercise of due care. It is not enough for the defendant merely to examine the mine every morning; it must also not allow any person to enter the mine until the examiner shall have reported all of the conditions safe for beginning work. If it violates this provision it is liable to an employe injured as the result thereof, even though such employe did not examine the examiner's report, and even though he had given the defendant notice of the dangerous condition of the mine. "Whether he (the plaintiff) relied on the statute or on the promise of the appellant (defendant) to repair, he had the right to assume that the appellant would keep its promise, and he also had the right to assume that it would comply with the statutory requirement, and was not bound to ascertain each morning whether it was doing so."

Odin Coal Co. v. Denman, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45 (1900), affirming 84 Ill. App. 190. Hurd's Rev. St. 1889, c. 93, § 6, provides that "a sufficient light shall be furnished at the top and bottom of the shaft to insure as far as possible the safety of persons getting on or off

the cage." Ordinarily the "top of the shaft" is the opening of the shaft at the surface of the ground, but if there is evidence in a given case to show that the structure around such opening, and the manner of operating, entering and departing from the cages, and delivery of coal from the shaft, have established the actual top of the shaft at some point above the surface of the ground, the "top of the shaft" is to be determined by the jury as a question of fact.

The element of evil intent is not a necessary ingredient of willfulness within the meaning of the word "willful" as employed in § 14 of the above act. "An act consciously omitted is willfully omitted, in the meaning of the word 'willful', as used in these enactments of our legislature relative to the duty of mine owners."

To maintain an action under these statutes, it is necessary for the plaintiff to show that the injury complained of resulted from the omission by the defendant of the statutory duty; that is, that the omission was the proximate cause of the injury. But the contributory negligence of the deceased is no defense to the mine owner. The plaintiff's recovery is limited to actual or direct damages, and the amount to be recovered is not to be mitigated or aggravated by the presence or absence of the element of fraud, malice, or evil intent.

Kellyville Coal Co. v. Hill, 87 Ill. App. 424 (1900). Under § 4, c. 93, 2 Starr & Curtis's Ann. Stat. 2719, a mine operator is obliged merely to employ an examiner holding a certificate authorizing him to act as such, whose duty it is to make an examination of the mine at the time required by law. A mere mistake of the examiner or a failure on his part to detect a defective place in the roof does not constitute a willful neglect of the operator within the meaning of the statute.

Himrod Coal Co. v. Adack, 94 Ill. App. 1 (1900). In an action under Hurd's Rev. St. 1899, c. 93, giving expressly a right of action for injuries inflicted or death produced by the willful violation of, or the willful failure to comply with, the positive requirements thereof, it is no defense to show that the persons injured or killed by reason of such violation or failure were themselves negligent and thereby contributed to such injury or death, or that with full knowledge of the increased hazards caused thereby, they continued in the service and assumed the risks thereof.

Kellyville Coal Co. v. Yehnka, 94 Ill. App. 74 (1900). If the "timberboss" of a mine knew for several days that timbers for props and cap-pieces were not furnished for use in the room of one of the miners, who during that time repeatedly requested the same, such knowledge and failure amount to a willful failure within the meaning of that term as used in § 16, Act of 1879, c. 93, Starr & C. Ann. St., and the operators of the mine are liable for injuries caused thereby to the miner.

Mt. Olive & S. Coal Co. v. Herbeck, 190 Ill. 39, 60 N. E. 105 (1901). Under Hurd's Rev. St. 1899, p. 1167, requiring coal operators to furnish, at the miners' request, timber for props and cap-pieces, a miner may recover damages for injuries sustained by failure to provide such timber, even though he is being paid higher wages because employed to work in the re-

removal of extra overhanging rock and slate, which is known to be dangerous work. The statute in question gives a right of action to "workmen", and a miner hired to take down a dangerous roof is none the less a "workman" within the meaning of the statute.

Western Anthracite Coal & Coke Co. v. Beaver, 192 Ill. 333, 61 N. E. 335 (1901), affirming 95 Ill. App. 95. Under 2 Starr & C. Ann. St. p. 2730, c. 93, § 16, a coal operator cannot excuse a willful failure on its part to furnish suitable props and cap-pieces to a miner, upon his request, to make his room safe, as required by the statute, by showing that the miner was guilty of negligence which contributed to the injury.

Under the statute the miner must be the one to determine the length and dimensions of the props and cap-pieces which he deems necessary to properly secure the roof for his own safety.

Spring Valley Coal Co. v. Rowalt, 196 Ill. 156, 63 N. E. 649 (1902), affirming 96 Ill. App. 248. Where there is a violation by a mine operator of the provisions of the act relating to the safety of miners, the questions of the plaintiff's contributory negligence and of the negligence of a fellow-servant are not involved and do not affect the right to recover.

Consolidated Coal Co. v. Lundak, 196 Ill. 594, 63 N. E. 1079 (1902), affirming 97 Ill. App. 109. Section 32 of the Mining Law of 1899, requiring the operators of mines to post in the mine rules for the conduct of the business and the government of the employes, is not complied with by the posting of notices and statements which are designed merely to relieve the operators from their duties and liabilities to their employes, as, for example, that the business is dangerous and the employes must be careful to avoid injury, that the manager does not assume that the place to which an employe is ordered is not dangerous but the employe must himself ascertain the danger and avoid it, and so on. "Such notices are nothing but an attempt to make laws under the guise of rules, and, so far as they are claimed to operate as a contract against the negligence and dereliction of the defendant, they are void, as against public policy."

Sunnyside Coal Co. v. Perry Center, 100 Ill. App. 546 (1902). The contributory negligence of the plaintiff is not a defense to injury caused by willful failure of a coal owner or operator to furnish props in compliance with the statute in reference thereto.

Donk Bros. Coal & Coke Co. v. Stroff, 100 Ill. App. 576 (1902), is to the same effect as the last case. "No conduct of the deceased, short of willfully seeking the very injury of which appellee complains, can have the effect of barring a recovery, when the defendant's willful conduct has brought about such injury." Under § 16, c. 93, Rev. St. 1899, the mine operator is liable if, although props were in the mine at the time of the accident, they were not at the "usual place" as provided by the statute, particularly when the miner knows nothing about them. This statute is a police regulation, and willful failure to obey its provisions has all the force of wanton and intentional injury in contemplation of law.

Lumaghi v. Voytilla, 101 Ill. App. 112 (1902). Section 28 (b), Hurd's Rev. St. 1901, p. 1218, requiring mine operators to maintain a good and

sufficient light at the bottom of the shaft, so that persons coming to the bottom may clearly discern the cage and objects in the vicinity, was intended only for the benefit of the men while entering and leaving the mine, and a miner injured while working in the mine at his usual labor cannot recover damages for a violation of its provisions.

Brookside Coal Min. Co. v. Hainal, 101 Ill. App. 175 (1902). Where a coal operator willfully fails to provide places of refuge in the walls of the mine on an inclined entry, he is guilty of a violation of § 21, Hurd's Rev. St. 1901, p. 1216, and a miner injured thereby can recover damages for such injury.

Himrod Coal Co. v. Sterens, 203 Ill. 115, 67 N. E. 389 (1903), affirming 104 Ill. App. 639. Under Hurd's Rev. St. 1901, p. 1202, § 19, providing for the proper ventilation of mines, mine operators are required to station attendants at all principal doorways, not only to assist in ventilation and to protect the miners against gases and impure air, but also to protect miners against the danger of collisions, and if a miner is injured by a collision caused by the failure of the operator to station an attendant at the doorway, he can recover damages for such injuries under the statute.

Marquette Third Vein Coal Co. v. Diclie, 110 Ill. App. 684 (1903). Section 22 of c. 93, Rev. St., forbids the employment in a mine of boys under 14 years of age, and § 33 makes any willful neglect, refusal or failure to obey the statute, a misdemeanor. Held that the word "willful" in the statute is not used in the sense of malicious or with evil intent; but an act consciously or knowingly performed or omitted contrary to the statute is a willful violation of the statute. The question in any given case whether a violation of the statute was willful is one of fact for the jury.

The mine operator is liable in damages for injuries sustained at the mine in the course of his employment by a boy under fourteen, employed in violation of the statute. The question of contributory negligence cannot arise.

Riverton Coal Co. v. Shepherd, 111 Ill. App. 294 (1903). Any conscious omission or failure to comply with the statutes as to the health and safety of mining employes renders the operator of a mine liable for ensuing injuries. Notice to a mine manager and mine examiner, or either of them, is notice to the operator of the defective condition of the curtains and of the existence of bad air, and the latter's failure to remedy the defects, and the neglect of the examiner to report the unsafe conditions, to mark the place, and to make a record thereof, are conscious omissions of the duties imposed upon a mine operator by Rev. St. 1901, p. 1214, § 18.

Junction Min. Co. v. Ench, 111 Ill. App. 346 (1903). Under § 31, c. 93, Rev. St. 1901, p. 1219, providing that miners shall not enter any part of the mine against caution, and § 32, providing that the operator shall post rules to govern the employes who shall then be charged with notice of the contents thereof, a rule forbidding a miner under any circumstances to leave his room before a certain hour is unreasonable, and a miner leaving because of illness cannot be held to have violated such a rule so as to prevent him recovering damages for injuries sustained by the negligence of his employer.

In addition to his obligation to comply with the requirements of the statute, the operator is subject to the common law of negligence.

Spring Valley Coal Co. v. Pating, 210 Ill. 342, 71 N. E. 371 (1904), affirming 112 Ill. App. 4. In an action by an employe against a mine operator for damages caused by the latter's violation of 2 Starr & C. Ann. St. 1896, p. 2716, c. 93, requiring him to furnish a sufficient light at the top and bottom of the shaft to insure, as far as possible, the safety of persons getting on and off the cage, there can be no valid defense offered of contributory negligence or plaintiff's assumption of a known risk.

Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902 (1906). The statute requires mine owners to employ mine examiners holding certificates from the state mining board, but does not carry to the owner, by such employment, exemption from liability for injuries resulting from neglect of duty on the part of the examiner, even though unknown to the owners. While in Pennsylvania and West Virginia such examiner is held to be a fellow-servant, in Illinois he is a vice-principal of the owner, and performs for the latter certain executive duties which the law does not permit the owner to delegate to others for the purpose of relieving himself from liability for the willful violation of his duties. The holding of certificates by such examiner is not ground for relieving the owner from liability.

Kelleyville Coal Co. v. Bruzas, 125 Ill. App. 464 (1906). Rev. St. c. 93, § 18, provides: "No one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe." "It may be that the law involved does not mean that the manager shall stand over the laborer and direct each act he may have to perform, but certainly it does mean that he shall, by reason of his special qualifications, direct and tell the man who is without these qualifications, how to do the work." Where a man, wholly ignorant of the work in a section of a mine known to the manager to be dangerous, is sent to that section to "clean the place", without the manager going along or giving further instructions, the mine owner is liable if the man is hurt while at such work.

Athens Min. Co. v. Carnduff, 221 Ill. 354, 77 N. E. 571 (1906). Section 18, c. 93 (4 Starr & C. St. p. 857), requires a daily examination of all mines to observe whether there are any accumulations of gas or other unsafe conditions, and that if such conditions exist the men should be notified and kept out until the conditions are remedied. "The conscious failure to observe and comply with the provisions of the Mines and Miners Act, even though no evil intent induces the failure, is a willful violation, and whether the willful failure of the mine operator to comply with the terms of the act relative to inspection, etc., is the proximate cause of a personal injury, is a question of fact for a jury."

Rosan v. Big Muddy Coal & Iron Co., 128 Ill. App. 128 (1906); *Carterville & Herrin Coal Co. v. Moake*, 128 Ill. App. 133 (1906). In an action for damages for personal injuries caused by violation of the provisions

of the miners act, it must be shown that the violation was willful, that there is a real connection between that violation and the injuries suffered, the latter resulting from the former, and that the servant injured comes within the class contemplated by the statute for whose protection it was enacted.

Wilmington & S. Coal Co. v. Sloan, 225 Ill. 467, 80 N. E. 265 (1907). A conscious neglect or failure to repair a curtain, the purpose of which is to keep the air traveling in certain currents, is a willful violation of the act.

Davis v. Illinois Collieries Co., 232 Ill. 284, 83 N. E. 836 (1908). A mine examiner is the vice-principal of the mine owner, who is not relieved from liability by the fact that he employs the examiner as required by law and the examiner reports conditions in the mine as satisfactory; the examiner's conscious failure to comply with the statute amounts to a willful violation thereof by the mine owner, whether he knows of his examiner's dereliction or not.

Marquette Third Vein Coal Co. v. Allison, 132 Ill. App. 221 (1907). Act of 1899, § 31, par. c, says: "All passageways communicating with the escapement shaft or place of exit from the main hauling ways to said place of exit shall be maintained free of obstruction at least five feet high and five feet wide." The act is limited to passages from the main hauling ways, and does not include all passageways leading to the main hauling ways through which the passageway to the escapement shaft might be reached.

Act of 1899, § 18, par. d, requires a mine examiner at all times, whose duty, inter alia, it shall be to visit the mine before the men are permitted to enter it, to inspect all places where men are expected to pass or to work, etc.; pars. c and d require that no one shall be allowed to enter the mine to work except under direction of the manager, etc., and further requires the mine examiner to make a daily record of the conditions in the mine, etc. Held a failure to make a record specifying dangers existent and examined is a violation of the statute, and in such case contributory negligence is no defense to an action begun under said act founded upon a willful violation thereof.

Southern Coal & Min. Co. v. Hopp, 133 Ill. App. 239 (1907). The Mine and Miners Act, § 16 (a), requires the mine manager always to provide a sufficient supply of props, caps and timber delivered on the miner's cars at the usual place when demanded for the securing of the roof by the miners, etc.; it is also made the duty of the miner to properly prop and secure his place with the materials. Held, the purpose of the statute was to aid the miners in protecting themselves against the dangers of a hazardous occupation, and not a measure for the greater security of other employes. Only those having use for the props and the right to demand them may complain of a willful failure, on the part of the manager, to comply with such demand.

Maplewood Coal Co. v. Graham, 134 Ill. App. 277 (1907). Contributory negligence by a party injured is no defense to an action based upon the willful failure of a mine operator to observe the requirements of the mines and miners act.

Gallatin Coal & Coke Co. v. Andrewzewski, 137 Ill. App. 1 (1907). A miner, acting under direction of the mine examiner, entered the mine to repair and make safe a dangerous place. While there he was killed by falling rock. Held, for the time and while so engaged as a repairer, his duty and the risks assumed were changed, and he was not then within the protection of the statute, providing for recovery where the mine examiner fails to inspect, mark and report unsafe conditions and keep miners from entering such unsafe places. The miner was complying with the statute when killed.

Moore v. Centralia Coal Co., 140 Ill. App. 291 (1908). In an action for damages for willful violation of the mines and miners act, the doctrines of fellow-servants, assumption of risk, and contributory negligence, have no application, and do not constitute defenses thereto.

Willful violation of the act means consciously or knowingly doing or omitting to do what the act requires; no evil intent need be shown.

Mertens v. Southern Coal & Min. Co., 235 Ill. 540, 85 N. E. 743 (1908). The mines and miners act (Hurd's St. 1905, p. 1388, § 18) makes it the duty of the mine examiner to make a daily examination of the mine, and if he finds "accumulations of gas, or recent falls or any dangerous conditions exist," he shall post a notice conspicuously that all men keep out.

(a) A dangerous condition in the roof of the mine is included in the phrase "any dangerous conditions exist."

(b) A "willful violation" of the act means a conscious violation thereof, and malice or evil intent need not be shown.

(c) Contributory negligence on the part of the miner will not defeat a recovery where he is injured by a willful disregard of the provisions of the statute.

Olson v. Kelly Coal Co., 236 Ill. 502, 86 N. E. 88 (1908). The mines and miners act (Hurd's St. 1905, p. 1388, § 18) requires that no one shall be allowed to enter a mine to work therein, except under the direction of the mine manager, until all the conditions shall have been made safe. "The statute clearly contemplates that the mine owner shall keep his mine in a safe condition to protect the men employed by him therein from injury, and to this end it is provided that a mine examiner and a mine manager shall be employed, and that the mine shall be examined and reports of its condition as disclosed by such examination made, and that a willful failure to make such examination or report, which results in injury to men working in the mine, shall make the mine owner liable for such injury. It is not, however, contemplated by the statute that the mine owner shall be relieved of liability for an injury resulting to men working in his mine, in consequence of a dangerous condition in the mine of which he has actual notice, by reason of the fact that he has not received notice of such condition through the channel of the report of his mine examiner. A mine examiner is a vice principal of the mine owner and actual notice to the mine examiner or the mine manager of a dangerous condition in the mine is notice to the mine owner of such condition."

Peebles v. O'Gara Coal Co., 239 Ill. 370, 88 N. E. 166 (1909). Contributory negligence by the injured person is no defense to an action based upon the mine owner's willful failure to carry out the provisions of § 16 of the mines and miners act of 1908. Under § 18 of the act, the operators of mines are liable not only when the dangerous conditions have been discovered by them, but also if, by the exercise of the care required by the provisions of the act, they could have discovered the existence of such conditions. Otherwise, simple neglect to make a daily inspection would relieve the operator from all liability. A "willful" violation of the act is a violation "knowingly" committed, the two terms being equivalent to each other.

Guthrie v. Empire Coal Co., 142 Ill. App. 332 (1908). The requirement of par. (a), § 21, c. 93, of mines and miners act of 1905, that places of refuge must be cut in the side walls of haulways, by its terms is confined to haulways "upon which persons employed in the mines must travel on foot to and from their work." In an action for personal injuries sustained by an employe while going along a haulway, in which there were no places of refuge, it may be shown in defense that the mine operator had provided a manway parallel to the haulway for men to use going to and from their work, and that plaintiff was forbidden to travel in the haulway and that there were conspicuous notices forbidding the men to travel in the haulway and requiring them to use the manway.

Hollingshead v. Wabash Coal Co., 142 Ill. App. 641 (1908). "Contributory negligence of the injured person is not a defense to an action based upon the alleged willful failure of a mine operator to comply with the requirements of the mines and miners act * * * and a mine operator is not authorized to substitute precautionary measures in lieu of those required by statute. In the absence of conspicuous marks at his working place, as notice to appellee of the dangerous condition of the roof of the entry and to keep out, he was justified in assuming that his working place had been examined and found to be free from danger and that he might safely work therein."

Indiana.

D. H. Davis Coal Co. v. Pollard, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319 (1902). In an action by an employe against a mine operator for violation of Burns' Rev. St. 1901, §§ 7447, 7472 (Horner's Rev. St. 1901, §§ 5472 a, 5480 m), it is no defense to allege that the employe knowingly assumed the risks occasioned by the failure of the defendant to comply with the statutes. There can, in such case, be no assumption of risk, although there may be contributory negligence to defeat the plaintiff's right of action.

Although these statutes expressly provide a penalty for their violation, the employe injured thereby has also a right of action against the mine owner for damages.

J. Wooley Coal Co. v. Bracken, 30 Ind. App. 624, 66 N. E. 775 (1903). Horner's Rev. St. § 5480 m (Burns' Rev. St. § 7472), requiring a min-

ing boss to perform certain specified duties, requires of the employer certain specific measures to be taken to provide for the safety of the employe; the particular means named must be used. The statute does not make the employer the insurer of the safety of the workman, but a failure to comply with its requirements is negligence.

Diamond Block Coal Co. v. Cuthbertson, 73 N. E. 818 (1905), affirming 67 N. E. 558, 73 N. E. 132. In an action against a mine operator for failure to obey the provisions of Burns' Ann. St. 1901, § 7473, the question of the plaintiff's contributory negligence is for the jury, but the burden of proving it is on the defendant. Where the plaintiff had no actual knowledge or notice of the defendant's failure to comply with the statute, and the risk was not apparent or obvious, he cannot be charged with having assumed the risk of accident resulting from the defendant's negligence.

Indiana & Chicago Coal Co. v. Neal, 166 Ind. 458, 77 N. E. 850 (1906). Section 18, Act of 1891, provides: "The doors used in assisting or directing the ventilation of the mine when coal is being hauled through shall be opened and closed by persons designated to do the same, so that the driver or other persons may not cause the doors to stand open." The purpose of the act was to prevent any interference with the circulation of the air in coal mines, and was not designed to protect drivers in passing through such openings. It is true that the act provides penalties for "any injury" occasioned by violation of the act, but the word "any" does not mean "every", but only such as the statute was designed to prevent. Hence there could be no recovery where a driver was injured by being struck on the head as he was trying to keep open self-closing doors while driving through them.

Antioch Coal Co. v. Rockett, 169 Ind. 247, 82 N. E. 76 (1907). Sections 7472 and 7479, Burns' Ann. St. 1901, make it the duty of mining bosses to examine and see that all working places are properly secured by props and timbers, and that, as the miners advance in their excavations, all loose coal, slate and rock overhead are carefully secured against falling, and that wherever such places are unsafe no one shall be permitted to enter except to make them safe. Failure to comply with these requirements is negligence per se. If it was impracticable to employ props, then the boss should have caused the loose coal, slate or rock to be taken down before he permitted men to work there. And where the conditions constantly changed as the miner progressed, he cannot be said to have assumed the risk.

Iowa.

Corson v. Coal Hill Coal Co., 101 Iowa, 224, 70 N. W. 185 (1897). McClain's Code 2463 and 2465 provides that if any miner or person employed in any mine shall neglect or refuse to securely prop the roof and entries under his control he shall be guilty of a misdemeanor, and makes it the duty of the owner, agent or operator to keep on hand a sufficient supply of timber for props. This has no application to an action by an employe

for damages for injury from negligence by failure to support the roof of an entry, where the plaintiff was not in control of the entry.

Mosgrove v. Zimbleman Coal Co., 110 Iowa, 169, 81 N. W. 227 (1899). The failure of a mine owner to obey the provisions of § 2488 of the Code, requiring him to provide a certain amount of ventilation in the mine, constitutes negligence, and an innocent person injured thereby is entitled to a civil remedy by way of damages. The measure of the obligation is the exercise of reasonable care in the selection, construction and use of appliances for the ventilation of the mine, but where the defendant introduces no evidence tending to show it to have been without fault in supplying the mine with air, an instruction to the jury is proper which is to the effect that the failure on the part of the defendant to provide and maintain a sufficient amount of ventilation in the mine is negligence on its part. Whether, in such a case, the plaintiff was guilty of contributory negligence, is for the jury.

Jacobson v. Smith, 123 Iowa, 263, 98 N. W. 773 (1904). Code, § 2489, which requires that safety gates shall be maintained at the opening of a shaft, is intended to guard the opening and prevent an involuntary entrance thereto, and not to prevent missiles from falling down the shaft. Therefore, a miner injured by being struck on the head by such a missile cannot recover damages under the provisions of said section.

Kansas.

Schmalstieg v. Leavenworth Coal Co., 65 Kan. 753, 70 Pac. 888, 59 L. R. A. 707 (1902). Chapter 159, Laws 1897, which makes it incumbent upon every mine owner, agent, lessee or operator of coal mines, to employ a competent fire boss, whose duties, as prescribed by the statute, are to "examine every working place every morning with a safety lamp before miners or other employes enter their respective working places," does not describe the limit of care to be exercised by such mine owner or operator towards employes engaged in working the mines. This statute increases the duty of the owner or operator of mines by requiring him to employ a competent person to look specially after the condition of the mine, and if, through the negligence of such fire boss, one of the employes is injured by the explosion of gas therein, the owner or operator is liable in damages for such injury.

Kentucky.

Ashland Coal & Iron R. Co. v. Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207 (1897). Section 2732 of the Kentucky Statutes, which provides "that any person employed in any mine governed by this statute, who intentionally or willfully neglects or refuses to securely prop the roof of any working-place under his control, or neglects or refuses to obey any order given by any superintendent of the mine in relation to the security of that part of the bank where he is at work," shall be liable to a fine, was intended "to refer to those persons actually engaged as miners in taking out coal, and thereby removing the natural props of the roof, and it has no appli-

cation to persons who are specially employed * * * to perform duties which had no connection in any way with the weakening or removal of these supports." Failure, therefore, on the part of such latter person, to comply with such statute is not evidence of contributory negligence on his part, so as to defeat a recovery by his administrator from the mine owner on the ground of negligence of the latter's servants resulting in a falling of part of the mine, causing the decedent's death.

Mosley's Adm'r v. Black Diamond Coal & Min. Co., 33 Ky. Law R. 110, 109 S. W. 306 (1908). Section 2731 of the Kentucky Statutes provides in part: "And at every mine operated by a shaft there shall be provided an approved safety catch, and a sufficient cover overhead, on all cages used for lowering and hoisting persons, and at the top of every shaft a safety gate shall be provided, and an adequate brake shall be attached to every drum or machine used in lowering or raising persons in all shafts and slopes." This statutory duty imposed upon mine owners is not complied with by furnishing gates that cannot be closed, and a company is guilty of negligence in permitting coal and other material to be placed and accumulate around these gates in such a manner as to prevent them from being closed. The safety gates contemplated by the statute are gates so arranged that they will either automatically close themselves when opened, or can easily be closed by persons using them. To provide a gate and then permit it to be and remain in such a condition, for any cause, that it cannot be closed, is the same as if no gate had been provided or maintained.

Curvin v. Grimes, 116 S. W. 725 (1909). The duty imposed by § 2731 upon owners, agents and lessees of coal mines, to maintain proper ventilation therein, cannot be delegated to some one else, and such party is liable for injuries caused by lack of ventilation, whether the person to whom the obligation was delegated was an independent contractor or not, and whether or not he failed to do the necessary bratticing, as privately agreed between them.

Majestic Collieries Co. v. McCoy, 116 S. W. 738 (1909). Code Supp. 1907 (W. Va.), § 410, requires that the operator or agent of a mine shall employ a competent or practical inside overseer, a mine foreman, who shall be an experienced coal miner, or any person having five years experience in a coal mine. Competency is the only real test. "If the foremen were known to be competent, they might be employed under this statute without reference to their experience; but, if they were not known to be competent, the employer might assume from their having had five years' experience in coal mines, that they were competent until the contrary was brought to their knowledge. But if they were known to be incompetent, their employment was negligence, no matter what experience they may have had."

"The miner does not assume the risk, unless obviously perilous, arising from the failure of the mine foreman to furnish the posts and perform the other duties imposed by the statute for the safety of the miners, and particularly is this true when such failure is due to the incompetency of the mine foreman."

Smith's Adm'r v. National Coal & Iron Co., 117 S. W. 280 (1909). St. 1909, § 331, makes it unlawful to employ any child less than fourteen years

old in a mine; § 66 gives a right of action to one injured by reason of such violation. Held, (1) Whether the boy was hurt when at his place in the mine, or going from or coming to work, was immaterial; (2) contributory negligence is a good defense.

Edward's Adm'r v. Lam, 119 S. W. 175 (1909). The statute regulating ventilation of coal mines does not contemplate a system of ventilation that will keep the miners free from negligent explosions of powder by the men working in an unskillful manner; but, under normal conditions in the mine, the draft must be such as will afford the minimum of pure air stated in the statute, and where the miners violate the rules of proper mining, so that the means provided under the statute for sufficient ventilation in proper mining are ineffectual, the mine owner is not liable.

Missouri.

Adams v. Kansas & Texas Coal Co., 85 Mo. App. 486 (1900). Under § 7076, Rev. St. 1899, requiring mine operators to furnish, at the request of a miner, a sufficient supply of timber to be used as props, the operator is liable in damages to a miner injured by the failure to supply such timber upon request, unless the miner voluntarily and knowingly places himself in peril resulting therefrom which is open and patent to the observation of any reasonable man. But even though the miner knows of the operator's failure to furnish the props, if the danger from lack of them is not open and patent and does not appear imminent, the miner is not barred from his right of action.

Poor v. Watson, 92 Mo. App. 89 (1902). If, in an action for damages for negligence, the particular wrongful acts, negligence, or defaults complained of, are provided against in Rev. St. 1899, § 8820, which provides for a right of action to the widow, lineal heirs, or adopted children, of one killed by the negligence of a mine owner or operator, and that the action must be brought within one year, then the provisions of that statute must control, and it ousts the general damage statute (§§ 2865-2866) from application.

Rev. St. 1899, § 8820, gives the sole survivorship of the right of action to the widow, if there be one; children can claim survivorship only in cases where no widow survives the deceased, or, if one, where she dies within the period limited for bringing the action.

The courts will take judicial notice that coal mines generate gas, and that therefore the expression in Rev. St. 1899, § 8802, "all mines generating gas," includes coal mines. This expression does not mean only "fire damp", but all noxious gases, whether explosive or not.

Barron v. Missouri Lead & Zinc Co., 172 Mo. 228, 72 S. W. 534 (1903). Rev. St. 1899, § 8811, requiring operators of mines operated by shafts to provide suitable means of signaling between the bottom and the top thereof, and a safe means of hoisting and lowering persons in a cage covered with boiler iron and furnished with certain specified guides, brakes, spring catches, etc., was intended for the protection of persons being lowered or hoisted in the cage used in the shaft, and there can be no recovery under

it for damages sustained by a "hoisterman" at work on top of the ground.

McDaniel's v. Royle Min. Co., 110 Mo. App. 706, 85 S. W. 679 (1905). Under § 8822, Rev. St. 1899, the mine owner must furnish sufficient timber to properly secure the workings, under the conditions and circumstances of the mine; it is not sufficient to furnish merely what may be deemed ordinarily sufficient. The term "properly secure" in the statute does not mean absolutely safe, but "such security as a reasonable and humane person watchful of the almost constant peril to his workmen, would afford, commensurate with the impending or threatened danger. Extraordinary care is required of the mine owner."

McKinnon v. Western Coal & Min. Co., 120 Mo. App. 148, 96 S. W. 485 (1906). Rev. St. 1899, § 8822, provides that owners, agents or operators of mines, shall keep a sufficient supply of timber to be used as props, so that workmen may at all times be able to properly shore the ceilings, etc., and that the mine operators shall send down all such props when required. Held that "required" meant "requested". The burden is not upon the owner to know when props are needed and to send them down without being requested, but to have a sufficient supply of props so that when a miner requests them he shall send them at once. Moreover, the act is for the benefit of those laborers working at a fixed price per bushel, as well as those working for wages; in fact it is for the benefit of all persons working in the mines. This case follows *Wojtylak v. Kansas & Texas Coal Co.*, 188 Mo. 260, 87 S. W. 506, which overrules *Bowerman v. Lackawanna Min. Co.*, 88 Mo. App. 308, 71 S. W. 1062.

Kirby v. Manufacturers' Coal & Coke Co., 127 Mo. App. 588, 106 S. W. 1069 (1907). To place a shot in a pillar between parallel entries which is so thin that the shot when exploded cannot safely perform the duty required of it is a violation of §§ 8823 and 8826, Rev. St. 1899. While § 8826 concerning the placing of shots is directed to the miner, still, where the pit boss knows that the pillar where he directs the shot to be placed is too thin, the master and not the servant is negligent, and liable if injuries result, for the miner is not supposed to assume that the master has violated the law in placing his entries too close, thereby making the pillar too thin.

Oklahoma.

Sans Bois Coal Co. v. Janeway, 99 Pac. 153 (1908). "The purpose of the act of Congress of July 1, 1902, requiring the owners or managers of every mine to provide an adequate amount of ventilation and proper appliances or machinery to force air through such mine to the face of each and every working place, so as to dilute and render harmless, and expel therefrom, the noxious and poisonous gases, was to protect the employes of such owners or managers from a well known danger of their service, the risk from which, from the nature of their employment, they were compelled to assume; and although an employe impliedly waives a compliance with the statute, and agrees to assume the risk from defective appliances by continuing in the service, a court will not recognize or enforce such agreement.

It is true that the statute provides that the violation thereof shall constitute a misdemeanor, and any person convicted of such violation shall pay a fine not exceeding \$500, but the imposition of a penalty for a violation of the statute does not exclude other means of enforcement; to permit owners or managers of mines to avail themselves of such assumption of risk by their employes would be in effect to enable them to nullify a penal statute, and that is against public policy."

Pennsylvania.

Allen v. Kingston Coal Co., 212 Pa. 54, 61 Atl. 572 (1905). The requirement of § 10 of the act of June 2, 1891, amended by the act of April 20, 1899, P. L. 65, that all main doors shall have an attendant "whose constant duty it shall be to open them for transportation and travel, and prevent them from standing open longer than is necessary for persons or cars to pass through," has reference only to ventilation, not to the safety of persons using the gangways. The plaintiff in an action for damages for the death of a miner who was crushed in the mine near the door can get no assistance from this act.

Gulla v. Lehigh Valley Coal Co., 28 Pa. Super. Ct. 11 (1905). A mining corporation which neglects to provide a guardrail for a dangerous platform, as provided by the act of June 2, 1891, P. L. 176, is liable in damages for the death of an employe who is killed while on the platform in pursuance of orders from the mine foreman, and while engaged in the performance of his work, and whose death is the result of the failure to provide such rail.

Saylor v. Chartiers Coal & Coke Co., 31 Pa. Super. Ct. 447 (1906). In an action against a coal mining company to recover damages for the death of plaintiff's husband, a miner, caused by an explosion of gas in a bituminous coal mine, the case is for the jury and a verdict and judgment for plaintiff will be sustained, where the evidence shows that the accident was due to the failure of the mine foreman to close up "cut throughs" that first became useless, and then dangerous, as the work progressed; that at the time of the explosion there was absolutely no material on hand, as required by law, to enable the foreman or anyone else to keep the ventilating apparatus in a condition necessary for the safety of the miner; and that such material had been asked for by the foreman and promised by the superintendent more than three weeks before, but was not furnished until the day after the explosion.

Lenahan v. Pittston Coal Min. Co., 218 Pa. 311, 67 Atl. 642, 120 Am. St. Rep. 885 (1907). Section 8 of the act of June 2, 1891, P. L. 176, provides that "No person under fifteen years of age shall be appointed to oil the machinery." "After full consideration we are unanimously of the opinion that the legislature, under its police power, could fix an age limit below which boys should not be employed, and when the age limit was so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and if the boy is injured while engaged in the performance of the prohibited duties for which he was employed, his em-

ployer will be liable in damages for injuries thus sustained. 'This rule is founded on the principle that when the legislature definitely established an age limit under which children should not be employed, as it had the power to do, the intention was to declare that a child so employed did not have the mature judgment, experience and discretion necessary to engage in that dangerous kind of work. A boy employed in violation of the statute is not chargeable with contributory negligence or with having assumed the risks of employment in such occupation.'

Bisko v. Braznell Gas Coal Co., 223 Pa. 186, 72 Atl. 504 (1909). Act of May 15, 1895, P. L. 52, art. 7, makes it the duty of the superintendent of a bituminous coal mine to keep on hand "a full supply of all materials and supplies required to preserve the health and safety of the employes as ordered by the mine foreman and required by this act." "Unless, therefore, it is made to appear that the mine foreman has made a requisition for materials on the owner or superintendent and it has been refused, or it is made to appear that the owner or superintendent has failed 'to keep on hand at the mines' the necessary materials or supplies, there can be no basis for a charge of negligence in failing to furnish supplies under the act of assembly which will support an action against the owner of the mines." Even if there was a failure to keep the necessary materials on hand, that cannot be made the basis of a recovery for personal injuries resulting from an explosion of gas, where it does not appear that such neglect was the cause of the injuries.

Golden v. Mt. Jessup Coal Co., Ltd., 225 Pa. 164, 73 Atl. 1103 (1909). Where a statute requires the employment by the operator of mines of a certified foreman and invests such foreman with the power to compel compliance with his directions so far as they relate to the safety of the employes in the mine, an employer cannot be held liable for the mistakes or incompetency of the state's representative.

Lenahan v. Crescent Coal Min. Co., 225 Pa. 218, 74 Atl. 58 (1909). In an action against a coal mining company to recover damages for the death of a boy alleged to have been caused by failure to provide an ambulance, as required by §1 of art. VII of the act of June 2, 1891, P. L. 176, a verdict and judgment for plaintiff will be sustained where there is evidence that the boy was injured in the mine, after which he was left in the engine house about half an hour, then placed on a stretcher and carried to his home about a mile away, that during the journey the covering over him became wet and cold, and that in the opinion of a physician his death was "the consequence of shock as the result of exposure and accident."

Wolcott v. Erie Coal & Coke Co., 226 Pa. 204, 75 Atl. 197 (1910). While a certified mine foreman is a fellow-servant of the miners employed in the mine, yet if the company which employs him makes him also the superintendent of the mine, and through his negligence the roof of an entry falls and injures a miner, the company will be liable for his negligence to the person injured.

Dempsey v. Buck Run Coal Co., 227 Pa. 571, 76 Atl. 745 (1910). The act of June 2, 1891, P. L. 176, and its supplements, provide a complete system

of ventilation applicable to all anthracite coal mines in the state. It requires the operator or superintendent to provide, maintain and construct an adequate supply of pure air for the mine, and specifically provides how the mine shall be ventilated, and among other things provides that the operator or superintendent shall place the underground workings and all that is related to the same under the charge, control and supervision of a competent person called a mine foreman. This mine foreman has charge of all matters pertaining to ventilation, and the act provides that no mine shall be operated for a longer period than thirty days without the supervision of a mine foreman.

It is the duty of the mine foreman to drive such headways as are necessary to ventilate the mine, and it is his, and not the owners' duty, to determine the necessity for another heading in the breast, and to drive the heading if good ventilation for that part of the mine requires it. When he has placed a competent mine foreman in charge and control of the mine, the owner has complied with the statutory injunctions that he should use precaution for the safety of the workmen, and he is not responsible for injuries to workmen resulting from any neglect or failure of the foreman to properly conduct and circulate the air currents along the face of the working places throughout the mine.

"While the owner is not responsible for the neglect of the duties imposed by statute upon the mine foreman, the former must nevertheless 'use every precaution to insure the safety of the workmen.' If any matter injuriously affecting the health or safety of the men is brought to his attention it is his duty to take the proper steps to correct it. If to the owner's knowledge the mine foreman or any other employe is neglecting the performance of his duties or the mine is in a condition which endangers the health or safety of the workmen, it is the duty of the owner to act promptly and have the dangers to the safety of the men removed; but where the owner is not in default, he cannot be made liable for the neglect of duty imposed by the statute upon another person. He necessarily must operate his mine largely through others, and when he complies with the provisions of the statutes enacted to protect his workmen, by employing competent assistants, he has done all that is required of him and ought not to be subjected to liabilities for which he is not responsible."

Tennessee.

Queen v. Dayton Coal & Iron Co., 95 Tenn. 548, 32 S. W. 460, 34 L. R. A. 656 (1895). The employment of an infant in a mine in violation of the statute forbidding such employment and declaring it a misdemeanor (Act 1881, c. 170 § 10) constitutes per se such negligence as renders the employer liable for all injuries sustained by the infant in the course of the employment. This, however, does not preclude the defense of contributory negligence.

Knowville Iron Co. v. Pace, 101 Tenn. 476, 48 S. W. 232 (1898). Chapter 170, Acts 1881, clause 8, provides that the owners of coal mines shall employ overseers to watch over the ventilating apparatus, airways, and all

things connected with and appertaining to the safety of the men at work in the mine; the overseers were to examine the mine every morning before the miners entered in order to ascertain that the mine is free from all danger. The duty of inspection imposed by this act did not apply only to noxious and explosive gases, but also made it incumbent on them to remove dust from the mine.

Russell v. Dayton Coal & Iron Co., 109 Tenn. 43, 70 S. W. 1, 97 Am. St. Rep. 836 (1902). Where a coal operator is guilty of a violation of Acts 1881, § 7, requiring a certain amount of ventilation to be furnished to mines, he is liable in damages to a miner injured thereby, even though the accident was due not only to such violation, but also to the concurring negligence of a fellow-servant of the plaintiff.

Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80 (1902). In an action under c. 170, Acts 1881, requiring mine operators to employ competent overseers, and requiring miners having charge of the working places in any mine to keep the roof thereof properly propped and timbered, there can be no recovery by a miner, where the mine operator employed a competent overseer, who was not negligent, and the miner himself was guilty of negligence which was the proximate cause of the accident.

Smith v. Dayton Coal & Iron Co., 115 Tenn. 543, 92 S. W. 62 (1905). Act 1881, c. 170, § 8, p. 238, requires the owner or agent to employ a competent and practical mining boss, and prescribes his duties. This act is a copy of the Pennsylvania act of 1870. The duties imposed by it on the mining boss are not different from those which the employer was obliged to perform at common law, and which he could not delegate and thereby escape liability. The master must provide a reasonably safe and permanent place of work for his employees. This duty cannot be delegated so as to exonerate the master from liability for its breach. The statute is not to be construed to change this duty. The employment of a mining boss is, therefore, not a defense to an action for personal injuries caused by failure to comply with the statutory requirement for the safety of the working places. The general rule in Tennessee as to safe places to work, and the fellow-servant doctrine, being different from that which prevails in Pennsylvania, the decisions of the latter state construing this statute are not followed.

Sal Creek Coal & Coke Co. v. Priddy, 117 Tenn. 168, 96 S. W. 610 (1906). Act 1903, c. 237, § 20, prescribes the employment of a certified mine foreman and the duties to be performed by him, "provided further that said mine foreman shall not be subject to the control of the operator or owner in the discharge of the duties required of said mine foreman by this act." The act also imposes penalties upon the mine foreman for failure to comply with its provisions. In view of the fact that the control of the foreman is taken away from the owner, the latter is not liable for injuries that may be caused by the negligence of the foreman.

Virginia.

Black's Adm'r v. Virginia Portland Cement Co., 108 Va. 121, 55 S. E. 537 (1906). A mine boss is not a fellow-servant of members of his gang under all circumstances. Though he is such fellow-servant while discharging duties affecting the mere administration of the work to be done, he is not a fellow-servant when discharging the nonassignable duties of the master, such as that to keep the quarry in a reasonable safe condition.

The master of a mine is bound to keep the place in which his servant works in a reasonably safe condition and to make constant inspection for the discovery of such facts as inspection would disclose. If the servant is hurt through no fault of his own, but the proximate cause was the negligence of the master in failing to discover and correct dangers not patent to the servant, the master is liable.

Washington.

Green v. Western American Co., 30 Wash. 87, 70 Pac. 310 (1902). A coal mine operator is liable in damages to a miner injured by the former's violation of Ballinger's Ann. Codes & St. § 3178, requiring coal mine operators to keep a sufficient supply of timber for props and to send down into the mine all such props when required. In such a case, the operator cannot set up as a defense that the miner assumed the risk arising from the failure to deliver such props, even though the miner knew of such failure. The defendant may, however, set up as a defense the contributory negligence of the plaintiff if the latter continued his work after the danger was so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom, and such question is one of fact for the jury.

Czarecki v. Seattle & S. P. R. & Nav. Co., 30 Wash. 288, 70 Pac. 750 (1902). Ballinger's Ann. Codes & St. § 3165, requiring coal mine operators to provide a good and sufficient amount of ventilation in the mine, was intended to "provide a reasonably safe place for the men to work in, and the ventilation at the working places of the men shall be such as to maintain them reasonably safe from dangerous gases by a good and sufficient ventilation of the mine. This is a positive duty imposed on the operator and the owner of the mine, and for the neglect of this duty the law holds such operator or owner liable if damages result therefrom."

Pachko v. Wilkeson Coal & Coke Co., 46 Wash. 422, 90 Pac. 436 (1907). Where a miner is killed or injured as a result of his employer's failing to comply with a statutory requirement, the defense of assumption of risk cannot be invoked.

West Virginia.

Williams v. Thacker Coal & Coke Co., 44 W. Va. 599, 30 S. E. 107 (1898). Section 11, p. 995, Code 1891, Append., provides that the operator or agent of a coal mine shall employ a competent and practical mining boss, and prescribes that "he shall see that as the miners advance their excavations,

proper breakthroughs are made * * * and that all loose coal, slate and rock overhead in the working places and along the haulways be removed or carefully secured, so as to prevent danger to persons employed in such mines."

The operator having employed an experienced and practical boss, he cannot be held liable for the death of an employe caused by a fall of rock from the ceiling of a haulway. The above section is copied from the Pennsylvania statute, and the decisions of the courts of that state are followed.

"The duty of the operator or agent is to employ a competent mine boss according to the provisions of the statute, and when he has done so, he has discharged his duty to his employes in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss, who is not a vice-principal, as his duties are not delegated to him by his employer, but are prescribed by statute, and he is a fellow-servant, as in case of an injury to other employes through his negligence the master is not responsible."

APPENDIX.

UNITED STATES STATUTES.

ENACTED SINCE 1897.

For statutes enacted prior to 1897, see Appendix to Vol. I.

Be it enacted, etc., that the provisions of section twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, shall not apply to claims or parts of claims owned by persons who may enlist in the volunteer army or navy of the United States for service in a war between this country and Spain, so that no mining claim or any part thereof owned by such person which has been regularly located and recorded shall be subject to forfeiture for nonperformance of the annual assessments until six months after such owner is mustered out of the service, or, if he should not survive the war, then six months after his death in the service.

Requirement of annual work not applicable to claims owned by volunteers in the Spanish War until six months after mustered out of service.

Sec. 2. That those desiring to take advantage of this act shall file, or cause to be filed, a notice in the clerk's office where the location certificate of said mine is recorded before the expiration of the assessment year, giving notice of his enlistment and of his desire to hold said claim under this act.

How act could be taken advantage of.

Sec. 3. That if any such enlisted soldier or sailor has a co-owner or co-owners in any mining claim, and who are not in the army or navy, and such co-owner or co-owners fail to do such a proportion of one hundred dollars' worth of work per annum as the interest of such nonenlisted person or persons bears to the whole claim, then such interest shall be open to relocation by any other qualified person or persons by their doing the necessary work thereon and filing an affidavit of labor showing the forfeiture and that the relocators had done the annual work required of such nonenlisted persons and succeeded them in right under this act, which work may be done at any time after the expiration of the assessment year and before the former owners resume work thereon. The work and affidavit aforesaid shall operate as a transfer of said forfeited interest from the former owners to said relocators. Act July 2, 1898, c. 563 (30 Stat. 651).

Failure of co-owner of enlisted soldier or sailor to do annual work.

Be it enacted, etc., that all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby

Mining laws extended to saline lands.

declared to be subject to location and purchase under the provisions of the law relating to placer mining claims: Provided, that the same person shall not locate or enter more than one claim hereunder. Act of Jan. 31, 1901 (31 Stat. 745).

Annual work on oil claims.

That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: Provided, that said labor will tend to the development or to determine the oil-bearing character of such contiguous claims. Act of Feb. 12, 1903, c. 548 (32 Stat. 825).

Description of vein or lode claims.

The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the description of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto. Rev. St. 2327, as amended by the Act of April 28, 1904, c. 1796 (33 Stat. 545).

Entrymen under nonmineral land laws, subsequently classified or claimed as coal lands, may receive patent subject to reservation by the United States of the coal, which shall be subject to disposal as coal lands.

Be it enacted, etc., that any person who has in good faith located, selected or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: Provided, that the owner

under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: Provided further, that nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector, or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed, shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal. Act March 3, 1900, c. 270 (35 Stat. 844).

Be it enacted, etc., that from and after the passage of this act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands, and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the act approved February nineteenth, nineteen hundred and nine, entitled "An act to provide for an enlarged homestead:" Provided, that those who have initiated nonmineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands, may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

Sec. 2. That any person desiring to make entry under the homestead laws or the desert-land law, any state desiring to make selection under section four of the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the secretary of the interior in withdrawing under the Reclamation Act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said acts, shall state in the application for entry, selection, or notice of withdrawal, that the same is made in accordance with and subject to the provisions and reservations of this act.

Sec. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this act, the entryman shall be entitled to a patent to the land entered by him, which

Coal lands subject to agricultural entry with reservation of the coal to the United States.

Coal in lands so patented subject to entry under Coal Land Laws.

patent shall contain a reservation to the United States of all coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this act, for the purpose of prospecting for coal thereon upon the approval of the secretary of the interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: Provided, that the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: Provided further, that nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation. Act, June 22, 1910 (36 Stat. L., 583).

Adverse claims in
Alaska.

Be it enacted etc., that in the district of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty-days period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office. Act July 7, 1910.

AN ACT MAKING FURTHER PROVISIONS FOR A CIVIL GOVERNMENT FOR ALASKA, AND FOR OTHER PURPOSES.

What recorded.

Sec. 15. The respective recorders shall, upon the payment of the fees for the same prescribed by the attorney general, record separately, in large and well bound separate books, in fair hand:

First. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney, leases which have been

acknowledged or proved, mortgages upon personal property;

* * * * *

Ninth. Affidavits of annual work done on mining claims;

Tenth. Notices of mining location and declaratory statements;

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers and others: Provided, notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district, the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject-matter is situated.

* * * * *

* * * * * Provided, miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: Provided further, all records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act

Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto, are hereby extended to the district of Alaska: Provided, that subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions, all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to explorations and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: Provided further, that the rules and regulations established

Mining claims.

Where instruments recorded.

Miners' regulations for recording, etc.; recorder.

Records at Dyea, etc., legalized.

Mining laws.

Gold, etc. Explorations on Bering Sea.

Miners' regulations.

Not to conflict with federal laws.

Exclusive permits
to mine void, etc.

Provision reserving
roadway, etc., not to
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by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permits shall be granted by the secretary of war authorizing any person or persons, corporation, or company, to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such rules and regulations as the secretary of war may prescribe for the preservation of order and the protection of the interests of commerce. Such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation; and the reservation of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," shall not apply to mineral lands or town sites. Act June 6, 1900 (31 Stat. 321-330).

Be it enacted, etc., that any person or association of persons qualified to make entry under the coal land laws of the United States, who shall have opened or improved a coal mine or coal mines, on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated, an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant

has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal land laws: Provided, that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

Sec. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land, or any part thereof sought to be purchased, shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

Sec. 4. That all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska. Act April 28, 1904, c. 1772 (33 Stat. 525).

Be it enacted, etc., that during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situated an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days' work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this act, the burden of proof shall be upon the claimant to establish the per-

Adverse claim.

Annual improvements, etc., required on mining claims in Alaska.

Filing affidavit.

Contents.

Prima facie evidence of performance of work, etc.

<p>Forfeiture.</p> <p>Officer before whom affidavits may be made.</p>	<p>formance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.</p>
<p>Time of filing.</p> <p>Fee.</p>	<p>Sec. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded. Act March 2, 1907, c. 2559 (35 Stat. 1243).</p>
<p>Consolidated coal claims in Alaska.</p>	<p>Be it enacted, etc., that all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the secretary of the interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated, and for this purpose such persons, their heirs or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: Provided, that no corporation shall be permitted to consolidate its claims under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska.</p>
<p>Preference right of United States to purchase product.</p>	<p>Sec. 2. That the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this act as may be necessary for the use of the army and navy, and at such reasonable and remunerative price as may be fixed by the president; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the court of claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase.</p>
<p>Combinations in restraint of trade forfeit title.</p>	<p>Sec. 3. That if any of the lands or deposits purchased under the provisions of this act shall be owned, leased, trusted, possessed or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of, or in any way effect any combination, or are in anywise controlled by any combination in the form of an unlawful trust, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, or</p>

of any holding of such lands by any individual, partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the district of Alaska, the title thereto shall be forfeited to the United States by proceedings instituted by the attorney general of the United States in the courts for that purpose.

Sec. 4. That every patent issued under this act shall expressly recite the terms and conditions prescribed in sections two and three hereof. Act May 28, 1908, c. 211 (35 Stat. 424).

TIMBER RIGHTS.

That the secretary of the interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber or any part thereof upon public lands in the District of Alaska, and may from time to time sell so much thereof, as he may deem proper for not less than the appraised value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the District of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the district from year to year, and payments for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold under such rules and regulations as the secretary of the interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the commissioner of the general land office in a separate account, and shall be covered into the treasury. The secretary of the interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said District of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes. Act May 14, 1898, c. 299, sec. 11 (30 Stat. 414).

In Alaska.

That section eight of an act entitled "An Act to repeal the timber culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended as follows:

In Idaho and Wyoming.

That it shall be lawful for the secretary of the interior to grant permits, under the provisions of the eighth section of the Act of March third, eighteen hundred and ninety-one, to citizens of Idaho and Wyoming to cut timber in the state of Wyoming west of the continental divide, on the Snake River and its tributaries to the boundary line of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the state of Idaho. Act July 1, 1898, c. 546, sec. 1 (30 Stat. 618).

LAND OFFICE REGULATIONS.

NATURE AND EXTENT OF MINING CLAIMS.

1. Mining claims are of two distinct classes: Lode claims and placers.

Lode Claims.

2. The status of lode claims located or patented previous to the 10th day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged, by sections 2322 and 2328, by investing the locator, his heirs or assigns, with the right to follow, upon the conditions stated therein, all veins, lodes or ledges, the top or apex of which lies inside of the surface lines of his claim.

3. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, other than the one named in the original location, to such as were not adversely claimed on May 10, 1872, and that, where such other vein or ledge was so adversely claimed at that date, the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

4. From and after the 10th of May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of fifteen hundred linear feet along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of fifteen hundred feet, but in no event can a location of a vein or lode made after the 10th day of May, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

5. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case exceed three hundred feet on each side of the middle of the vein at the surface, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface except where adverse rights existing on the 10th of May, 1872, may render such limitation necessary; the end-lines of such claims to be in all cases parallel to each other. Said lateral measurements cannot extend beyond three hundred feet on either side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet cannot be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration where the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

6. By the foregoing it will be perceived that no lode claim located after the 10th of May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or state or territorial laws in force in the several mining districts; and that no such local regulations or state or territorial laws shall limit a vein or lode claim

to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

7. Locators cannot exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim.

8. No claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of bona fide prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

9. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well known gulches, ravines or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the locus of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

10. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery, it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

11. The location notice must be filed for record in all respects as required by the state or territorial laws and local rules and regulations, if there be any.

12. In order to hold the possessory title to a mining claim located prior to May 10, 1872, the law requires that ten dollars shall be expended annually in labor or improvements for each one hundred feet in length along the vein or lode. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made thereon annually. Under the provisions of the act of congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Where a number of contiguous claims are held in common, the aggregate expenditure that would be necessary to hold all the claims may be made upon any one claim. Cornering locations are held not to be contiguous.

13. Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns or legal representatives have resumed work after such failure and before relocation.

14. Annual expenditure is not required subsequent to entry, the date of issuing the patent certificates being the date contemplated by statute.

15. Upon the failure of any one of several co-owners to contribute his proportion of the required expenditures, the co-owners, who have performed the labor or made the improvements as required, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

Tunnels.

16. The effect of section 2323, Revised Statutes, is to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the line thereof and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

17. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right, the actual or proposed course or direction of the tunnel, the height and width thereof, and the course and distance from such face or point of commencement to some permanent well known objects in the vicinity by which to fix and determine the locus in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

18. A full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is bona fide their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

Placer Claims.

19. But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.

20. The act of August 4, 1892, extends the mineral-land laws so as to bring lands chiefly valuable for building stone within the provisions of said law by authorizing a placer entry of such lands. Registers and receivers should make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. Lands reserved for the benefit of public schools or donated to any state are not subject to entry under said act.

21. The act of February 11, 1897, provides for the location and entry of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

22. By section 2330 authority is given for subdividing forty-acre legal subdivisions into ten-acre tracts. These ten-acre tracts should be considered and dealt with as legal subdivisions, and an applicant having a placer claim which conforms to one or more of such ten-acre tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat.

23. (Omitted.)

24. A ten-acre subdivision may be described, for instance if situated in the extreme northeast of the section, as the "NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ " of the section, or, in like manner, by appropriate terms, wherever situated; but, in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. The proofs submitted with applications must show clearly the character and extent of the improvements upon the premises.

25. The proof of improvements must show their value to be not less than five hundred dollars and that they were made by the applicant for patent or his grantors. This proof should consist of the affidavit of two or more disinterested witnesses. The annual expenditure to the amount of \$100, required by section 2324, Revised Statutes, must be made upon placer as well as lode locations.

26. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat, the field notes and plat giving the area of the lode claim

or claims and the area of the placer separately. An application which omits to claim such known vein or lode must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

27. By section 2330 it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

28. Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and such locations shall not include more than twenty acres for each individual claimant.

29. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed twenty acres for each individual participating therein; that is, a location by two persons cannot exceed forty acres, and one by three persons cannot exceed sixty acres.

30. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that all placer mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands.

Conformity to the public land surveys and the rectangular subdivisions thereof will not be required where compliance with such requirement would necessitate the placing of the lines thereof upon other prior located claims or where the claim is surrounded by prior locations.

Where a placer location by one or two persons can be entirely included within a square forty-acre tract, by three or four persons within two square forty-acre tracts placed end to end, by five or six persons within three square forty-acre tracts and by seven or eight persons within four square forty-acre tracts, such locations will be regarded as within the requirements where strict conformity is impracticable.

Whether a placer location conforms reasonably with the legal subdivisions of the public surveys is a question of fact to be determined in each case and no location will be passed to patent without satisfactory evidence in this regard. Claimants should bear in mind that it is the policy of the government to have all entries, whether of agricultural or mineral lands, as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular or fantastically shaped tracts. (Snow Flake Fraction Placer, 37 L. D. 250.)

Regulations Under Saline Act.

31. Under the act approved January 31, 1901, extending the mining laws to saline lands, the provisions of the law relating to placer-mining claims are extended to all states and territories and the District of Alaska, so as to permit the location and purchase thereunder of all unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, with the proviso "That the same person shall not locate or enter more than one claim hereunder."

32. Rights obtained by location under the placer-mining laws are assignable, and the assignee may make the entry in his own name; so, under this act a person holding as assignee may make entry in his own name: Provided, he has not held under this act, at any time, either as locator or entryman, any other lands. His right is exhausted by having held under this act any particular tract, either as locator or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

33. In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the notice of location presented for record and the application for patent must each contain a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located or entered any other lands under the provisions of this act. Assignments made by persons who are not severally qualified as herein stated will not be recognized.

PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

Lode Claims.

34. The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor general of the state or territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes in each case will be prepared by the surveyor general; one plat and the original field notes to be retained in the office of the surveyor general; one copy of the plat to be given the claimant for posting upon the claim; one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor general to the register of the proper land district, to be retained on his files for future reference. As there is no resident surveyor general for the state of Arkansas, applications for the survey of mineral claims in said state should be made to the commissioner of this office, who, under the law, is *ex officio* the U. S. surveyor general.

35. The survey and plat of mineral claims required to be filed in the proper land office with application for patent must be made subsequent to the recording of the location of the claim (if the laws of the state or territory or the regulations of the mining district require the notice of location to be recorded), and when the original location is made by survey of a United States mineral surveyor, such location survey cannot be substituted for that required by the statute, as above indicated.

36. The surveyors general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument.

Such connecting line must not be more than two miles in length, and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line or traverse line must be surveyed by the mineral surveyor at the time of his making the particular survey and be made a part thereof.

37. (a) Promptly upon the approval of a mineral survey the surveyor general will advise both this office and the appropriate local land office, by letter (Form 4-286), of the date of approval, number of the survey, name and area of the claim, name and survey number of each approved mineral survey with which actually in conflict, name and address of the applicant for survey, and name of the mineral surveyor who made the survey; and will also briefly describe therein the locus of the claim, specifying each legal subdivision or portion thereof, when upon surveyed lands, covered in whole or in part by the survey; but hereafter no segregation of any such claim upon the official township-survey records will be made until mineral entry has been made and approved for patent, unless otherwise directed by this office.

(b) Upon application to make agricultural entry of the residue of any original lot or legal subdivision of forty acres, reduced by mining claims for which patent applications have been filed and which residue has been already reallocated in accordance therewith, the local officers will accept and approve the application as usual, if found to be regular. When such an application is filed for any such original lot or subdivision, reduced in available area by duly asserted mining claims but not yet reallocated accordingly, the local officers will promptly advise this office thereof, and will also report and identify any pending application for mineral patent affecting such subdivision which the agricultural applicant does not desire to contest. The surveyor general will thereupon be advised by this office of such mining claims, or portions thereof, as are proper to be segregated, and directed to at once prepare, upon the usual drawing-paper township blank, diagram of amended township survey of such original lot or legal forty-acre subdivision so made fractional by such mineral segregation, designating the agricultural portion by appropriate lot number, beginning with No. 1 in each section and giving the area of each lot, and will forthwith transmit one approved copy to the local land office and one to this office. In the meantime, the local officers will accept the agricultural application (if no other objection appears), suspend it with reservation of all rights of the applicant if continuously asserted by him, and upon receipt of amended township diagram will approve the application (if then otherwise satisfactory) as of the date of filing, corrected to describe the tract as designated in the amended survey.

(c) The register and receiver will allow no agricultural claim for any portion of an original lot or legal forty-acre subdivision, where the reduced area is made to appear by reason of approved surveys of mining claims and for which applications for patent have not been filed, until there is submitted by such agricultural applicant a satisfactory showing that such surveyed claims are in fact mineral in character; and applications to have lands asserted to be mineral, or mining locations, segregated by survey, with the view to agricultural appropriation of the remainder, will be made to the register and receiver for submission to the commissioner of the general land office, for his consideration and direction, and must be supported by the affidavit of the party in interest, duly corroborated by two or more disinterested persons, or by such other or further evidence as may be required in any case, that the lands sought to be segregated as mineral are in fact mineral in character; otherwise, in the absence of

satisfactory showing in any such case, such original lot or legal subdivision will be subject to agricultural appropriation only. When any such showing shall be found to be satisfactory and the necessary survey is had, amended township diagram will be required and made as prescribed in the preceding section.

38. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on the vein in each direction from the point of discovery or other well defined place on the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres
Total area of claim	10.50
Area in conflict with survey No. 302	1.56
Area in conflict with survey No. 948	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. The application for patent should state the portions to be excluded in express terms.

39. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat survey. Too much care cannot be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent.

40. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting, a copy of the notice so posted to be attached to and form a part of said affidavit.

41. Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations and customs of the mining district, state, or territory in which the claim lies, and with the mining laws of congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession and the basis of his claim to a patent. The vein or lode must be fully described, the description to include a statement as to the kind and character of mineral, the extent thereof, whether ore has been

extracted, and of what amount and value, and such other facts as will support the applicant's allegation that the claim contains a valuable mineral deposit.

42. This sworn statement must be supported by a copy of each location notice, certified by the legal custodian of the record thereof, and also by an abstract of title of each claim, completed to the date of filing said statement and certified by the legal custodian of the records of transfers, or by a duly authorized abstractor of titles. The certificate must state that no conveyances affecting the title to the claim or claims appear of record other than those set forth.

Abstracters will be required to attach to each abstract certified by them a certificate stating that they have filed in the office of the commissioner of the general land office a certified copy of the existing statute by which they are authorized to compile abstracts of title, and evidence in the form of a certificate by the proper state, territorial, or county officer, that they have complied with the requirements of such statute.

43. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc., and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

44. Before receiving and filing an application for mineral patent local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the rules of practice.

Local officers will give prompt and appropriate notice to the railroad grantee of the filing of every application for mineral patent which embraces any portion of an odd-numbered section of surveyed lands within the primary limits of a railroad land grant, and of every such application embracing any portion of unsurveyed lands within such limits (except as to any such application which embraces a portion or portions of those ascertained or prospective odd-numbered sections only, within the limits of the grant in Montana and Idaho to the Northern Pacific Railroad Company, which have been classified as mineral under the act of February 26, 1895, without protest by the company within the time limited by the statute or the mineral classification whereof has been approved).

Should the railroad grantee file protest and apply for a hearing to determine the character of the land involved in any such application for mineral patent, proceedings thereunder will be had in the usual manner.

Any application for mineral patent, however, which embraces lands previously listed or selected by a railroad company, will be disposed of as provided by the first section of this paragraph, and the applicant afforded opportunity to protest and apply for a hearing or to appeal.

Notice should be given to the duly authorized representative of the railroad grantee, in accordance with rule 17 of practice. When the claims applied for are upon unsurveyed land, the burden of proving that they are situate within prospective odd-numbered sections will rest upon the railroad.

Evidence of service of notice should be filed with the record in each case.

45. Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who

must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a weekly newspaper, nine consecutive insertions are necessary; when in a daily newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

46. The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances.

47. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

48. The claimant at the time of filing the application for patent, or at any time within sixty days of publication, is required to file with the register a certificate of the surveyor general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several contiguous locations held in common, that an amount equal to five hundred dollars for each location has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated in a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof: Provided, that as to all applications for patents made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient, and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

49. The surveyor general may derive his information upon which to base his certificate as to the value of labor expended or improvements made from the mineral surveyor who makes the actual survey and examination upon the premises, and such mineral surveyor should specify with particularity and full detail the character and extent of such improvements, but further or other evidence may be required in any case.

50. It will be convenient to have this certificate indorsed by the surveyor general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

51. After the sixty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

52. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, and no other objection appears, permit the claimant to pay for the land to which he is entitled at the rate of five dollars for each acre and five dollars for

each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the commissioner of the general land office and a patent issued thereon if found regular.

53. At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Such protest cannot, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a co-owner excluded from an application for patent does not have an "adverse" claim within the meaning of sections 2325 and 2326 of the Revised Statutes. (See *Turner v. Sawyer*, 150 U. S. 578-586.)

54. Any party applying for patent as trustee must disclose fully the nature of the trust and the name of the cestui que trust; and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

55. The annual expenditure of one hundred dollars in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts.

56. The failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

57. The proceedings necessary to the completion of an application for patent to a mining claim, against which an adverse claim or protest has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

Placer Claims.

58. The proceedings to obtain patents for placer claims, including all forms of mineral deposits excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where a placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required. Where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

59. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it

being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; the price of placer claims being fixed, however, at two dollars and fifty cents per acre or fractional part of an acre.

(C). In placer applications, in addition to the recitals necessary in and to both vein or lode and placer applications, the placer application should contain in detail such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation, and that title is sought not to control watercourses or to obtain valuable timber, but in good faith because of the mineral therein. This statement, of course, must depend upon the character of the deposit and the natural features of the ground, but the following details should be covered as fully as possible: If the claim be for a deposit of placer gold, there must be stated the yield per pan, or cubic yard, as shown by prospecting and development work, distance to bedrock, formation and extent of the deposit, and all other facts upon which he bases his allegation that the claim is valuable for its deposits of placer gold. If it be a building stone or other deposit than gold claimed under the placer laws, he must describe fully the kind, nature, and extent of the deposit, stating the reasons why same is by him regarded as a valuable mineral claim. He will also be required to describe fully the natural features of the claim; streams, if any, must be fully described as to their course, amount of water carried, fall within the claim; and he must state kind and amount of timber and other vegetation thereon and adaptability to mining or other uses.

If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

While this data is required as a part of the mineral surveyor's report under paragraph 167, in case of placers taken by special survey, it is proper that the application for patent incorporate these facts under the oath of the claimant.

Inasmuch as in case of claims taken by legal subdivisions no report by a mineral surveyor is required, the claimant, in his application in addition to the data above required, should describe in detail the shafts, cuts, tunnels, or other workings claimed as improvements, giving their dimensions, value, and the course and distance thereof to the nearest corner of the public surveys.

As prescribed by paragraph 25, this statement as to the description and value of the improvements must be corroborated by the affidavits of two disinterested witnesses.

Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to proof as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

Local land officers are instructed that if the proofs submitted in placer applications under this paragraph are not satisfactory as showing the land as a whole to be placer in character, or if the claims impinge upon or embrace watercourses or bodies of water, and thus raise a doubt as to the bona fides of the location and application, or the character and extent of the deposit claimed thereunder, to call for further evidence, or if deemed necessary, request the specific attention of the chief of field

service thereto in connection with the usual notification to him under the circular instructions of April 24, 1907, and suspend further action on the application until a report thereon is received from the field officer.

MILL SITES.

61. Land entered as a mill site must be shown to be nonmineral. Mill sites are simply auxiliary to the working of mineral claims, and as section 2337, which provides for the patenting of mill sites, is embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

62. To avail themselves of this provision of law, parties holding the possessory right to a vein or lode claim, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace and describe, in addition to the vein or lode claim, such noncontiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may by an independent application, secure a mill site if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

63. Where the original survey includes a lode claim and also a mill site, the lode claim should be described in the plat and field notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation, the course and distance from the corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode claim for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill site claim.

64. In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode claim, the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

65. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable, from acquaintance with the land, to testify understandingly.

CITIZENSHIP.

66. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming

such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

67. In case of an individual or an association of individuals who do not appear by their duly authorized agent, the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence, will be required.

68. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

69. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land districts; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any state or territory.

70. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

71. No entry will be allowed until the register has satisfied himself, by careful examination, that proper proofs have been filed upon the points indicated in the law and official regulations. Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance, inuring to the transferee of such applicant where a transfer has been made pending the application for patent.

72. The mineral entries will be given the current serial numbers according to the provisions of the circular of June 10, 1908, whether the same are of lode or of placer claims or of mill sites.

73. In sending up the papers in a case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued. The schedule of papers, form 4-252f, should accompany the returns with all mineral applications and entries allowed.

POSSESSORY RIGHT.

74. The provisions of section 2332, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

75. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the state or territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

76. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the state or territory as aforesaid other than that which has been finally decided in favor of the claimant.

77. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

ADVERSE CLAIMS.

78. An adverse claim must be filed with the register and receiver of the land office where the application for patent is filed or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.

79. Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

80. The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

81. The adverse claim so filed must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator. If the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

82. In order that the "boundaries" and "extent" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict: Provided, however, that if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a mineral surveyor, and its correctness officially certified thereon by him.

83. Upon the foregoing being filed within the sixty days' period of publication, the register, or in his absence the receiver, will immediately give notice in writing to the parties that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence

to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived and the application for patent be allowed to proceed upon its merits.

84. When an adverse claim is filed as aforesaid, the register or receiver will endorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be stayed, with the exception of the completion of the publication and posting of notices and plat and the filing of the necessary proof thereof, until the controversy shall have been finally adjudicated in court or the adverse claim waived or withdrawn.

85. Where an adverse claim has been filed and suit thereon commenced within the statutory period and final judgment rendered determining the right of possession, it will not be sufficient to file with the register a certificate of the clerk of the court setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment roll, together with the other evidence required by section 2326, Revised Statutes.

86. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

87. After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment of the adverse claim will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

88. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the state court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required.

APPOINTMENT OF SURVEYORS FOR SURVEY OF MINING CLAIMS AND CHARGES.

89. Section 2334 provides for the appointment of surveyors to survey mining claim, and authorizes the commissioner of the general land office to establish the rates to be charged for surveys and for newspaper publications. Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

(1) Where a daily newspaper is designated the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication, five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body type used for advertisements.

(2) For the publication of citations in contests or hearings involving the character of lands the charges shall not exceed eight dollars for five publications in weekly newspapers or ten dollars for publications in daily newspapers for thirty days.

90. The surveyors general of the several districts will, in pursuance of said law, appoint in each land district as many competent surveyors for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The

statute provides that the claimant shall also be at liberty to employ any United States mineral surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into a bond of not less than \$5,000 for the faithful performance of his duties.

91. With regard to the platting of the claim and other office work in the surveyor general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor general duplicate certificates of such deposit in the usual manner.

92. The surveyors general will endeavor to appoint surveyors to survey mining claims so that one or more may be located in each mining district for the greater convenience of miners.

93. The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them.

The duty of the surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors general and local land officers are expected to report any infringement of this regulation to this office.

94. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

FEEs OF REGISTERS AND RECEIVERS.

95. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, Rev. St. par. 9.)

(Paragraphs 96, 97 and 98, are superseded by the general circular instructions of June 10, 1908.)

HEARINGS TO DETERMINE CHARACTER OF LANDS.

99. The rules of practice in cases before the United States district land offices, the general land office, and the department of the interior, will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the character of lands.

100. Public land returned by the surveyor general as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return shall be overcome by testimony taken in the manner hereinafter described.

101. Hearings to determine the character of lands:

(1) Lands returned as mineral by the surveyor general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is not required, notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

(Paragraphs 102 to 104, inclusive, are superseded by appropriate instructions relative to nonmineral proofs in railroad, state, and forest lieu selections contained in separate circulars.)

105. At hearings to determine the character of lands, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof, whether of the shallow-surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all. In every case, where practicable, an adequate quantity or number of representative samples of the alleged mineral-bearing matter or material should be offered in evidence, with proper identification, to be considered in connection with the record, with which they will be transmitted upon each appeal that may be taken. Testimony may be submitted as to the geological formation and development of mineral on adjoining or adjacent lands and their relevancy.

106. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof, the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

107. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of minerals were first known to exist on the lands.

108. When the case comes before this office, such decision will be made as the law and the facts may justify. In cases where a survey is necessary to set apart the mineral from the agricultural land, the proper party, at his own expense, will be required to have the work done by a reliable and competent surveyor to be designated by the surveyor general. Application therefor must be made to the register and receiver, accompanied by a description of the land to be segregated and the evidence of service upon the opposite party of notice of his intention to have such

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segregation made. The register and receiver will forward the same to this office, when the necessary instructions for the survey will be given. The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, Revised Statutes, as to length and width and parallel end lines.

109. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, United States commissioner, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

110. Upon the filing of the plat and field notes of such survey with the register and receiver, duly sworn to as aforesaid, they will transmit the same to the surveyor general for his verification and approval, who, if he finds the work correctly performed, will furnish authenticated copies of such plat and description both to the proper local land office and to this office, made upon the usual drawing-paper township blank.

The copy of plat furnished the local office and this office must be a diagram verified by the surveyor general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the same as provided in paragraph 37 in the survey of mining claims on surveyed lands.

111. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land, he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the general land office.

DISTRICT OF ALASKA.

112. Section 13, Act of May 14, 1898, according to native-born citizens of Canada, "the same mining rights and privileges" in the district of Alaska as are accorded to citizens of the United States in British Columbia and the northwest territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

113. For the sections of the Act of June 6, 1900, making further provision for a civil government for Alaska, which provide for the establishment of recording districts and the recording of mining locations; for the making of rules and regulations by the miners and for the legalization of mining records; for the extension of the mining laws to the district of Alaska, and for the exploration and mining of tide lands and lands below low tide; and relating to the rights of Indians and persons conducting schools or missions, see page 21 of this circular.

MINERAL LANDS WITHIN NATIONAL FORESTS.

114. The act of June 4, 1897, provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be sub-

ject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

The act also provides that "The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located."

Transfer of National Forests.

Act of February 1, 1905 (33 Stat. 628).

The secretary of the department of agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March 3, 1891, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands. (For further information see Use Book—Forest Service.)

SURVEYS OF MINING CLAIMS.

General Provisions.

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115. Under section 2334, Revised Statutes, the U. S. surveyor general "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims."

116. Persons desiring such appointment should therefore file their applications with the surveyor general for the district wherein appointment is asked, who will furnish all information necessary.

117. All appointments of mineral surveyors must be submitted to the commissioner of the general land office for approval.

118. The surveyors general have authority to suspend or revoke the commissions of mineral surveyors for cause. Before final action, however, the matter should be submitted to the commissioner of the general land office for approval.

119. Such surveyors will be allowed the right of appeal from the action of the surveyor general in the usual manner. Such appeal should be filed with the surveyor general, who will at once transmit the same, with a full report, to the general land office.

120. Neither the surveyor general nor the commissioner of the general land office has jurisdiction to settle differences, relative to the payment of charges for field work, between mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner, i. e., in the local courts. The department has, however, authority to investigate charges affecting the official actions of mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment.

121. The surveyors general should appoint as many competent mineral surveyors as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms.

122. The schedule of charges for office work should be as low as is possible. No additional charges should be made for orders for amended surveys, unless the necessity therefor is clearly the fault of the claimant, or considerable additional office work results therefrom.

123. (Omitted.)

124. Mineral surveyors will address all official communications to the surveyor general. They will, when a mining claim is the subject of correspondence, give the name and survey number. In replying to letters they will give the subject-matter and date of the letter. They will promptly notify the surveyor general of any change in post office address.

125. Mineral surveyors should keep a complete record of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field notes and other reports must be written in a clear and legible hand or typewritten, in noncopying ink, and upon the proper blanks furnished gratuitously by the surveyor general's office upon application therefor. No interlineations or erasures will be allowed.

126. No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States mineral surveyor, and made in pursuance of a special order from the surveyor general's office. After he has received an order for survey he is required to make the survey and return correct field notes thereof to the surveyor general's office without delay.

127. The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same.

128. A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His duty in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat, with his report, to the surveyor general. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the same case by administering oaths to the parties in interest. It is preferable that both preliminary and final oaths of assistance should be taken before some officer duly authorized to administer oaths, other than the mineral surveyor. In cases, however, where great delay, expense or inconvenience would result from a strict compliance with this rule, the mineral surveyor is authorized to administer the necessary oaths to his assistants, but in each case where this is done, he will submit to the proper surveyor general a full written report of the circumstances which required his stated action; otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will not employ chainmen interested therein in any manner.

Method of Survey.

129. The survey made and returned must, in every case, be an actual survey on the ground in full detail, made by the mineral surveyor in person after the receipt of the order, and without reference to any knowledge he may have previously acquired by reason of having made the loca-

tion survey or otherwise, and must show the actual facts existing at the time. This precludes him from calculating the connections to corners of the public survey and location monuments, or any other lines of his survey through prior surveys made by others and substituting the same for connections or lines of the survey returned by him. The term survey in this paragraph applies not only to the usual field work, but also to the examinations required for the preparation of affidavits of five hundred dollars expenditure, descriptive reports on placer claims, and all other reports.

130. The survey of a mining claim may consist of several contiguous locations, but such survey must, in conformity with statutory requirements, distinguish the several locations, and exhibit the boundaries of each. The survey will be given but one number.

131. The survey must be made in strict conformity with, or be embraced within, the lines of the location upon which the order is based. If the survey and location are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of survey to the corresponding corner of the location, and the location corner must be fully described, so that it can be identified. The lines of the location, as found upon the ground, must be laid down upon the preliminary plat in such a manner as to contrast and show their relation to the lines of survey.

132. In view of the principle that courses and distances must give way when in conflict with fixed objects and monuments, the surveyor will not, under any circumstances, change the corners of the location for the purpose of making them conform to the description in the record. If the difference from the location be slight, it may be explained in the field notes.

133. No mining claim located subsequent to May 10, 1872, should exceed the statutory limit in width on each side of the center of vein or 1,500 feet in length, and all surveys must close within 50-100 feet in 1,000 feet, and the error must not be such as to make the location exceed the statutory limit, and in absence of other proof the discovery point is held to be the center of the vein on the surface. The course and length of the vein should be marked upon the plat.

134. All mineral surveys must be made with a transit, with or without solar attachment, by which the meridian can be determined independently of the magnetic needle, and all courses must be referred to the true meridian. The variation should be noted at each corner of the survey. The true course of at least one line of each survey must be ascertained by astronomical observations made at the time of the survey; the data for determining the same and details as to how these data were arrived at must be given. Or, in lieu of the foregoing, the survey must be connected with some line the true course of which has been previously established beyond question, and in a similar manner, and, when such lines exist, it is desirable in all cases that they should be used as a proof of the accuracy of subsequent work.

135. Corner No. 1 of each location embraced in a survey must be connected by course and distance with nearest corner of the public survey or with a United States mineral monument, if the claim lies within two miles of such corner or monument. If both are within the required distance, the connection must be with the corner of the public survey.

136. Surveys and connections of mineral claims may be made in suspended townships in the same manner as though the claims were upon unsurveyed land, except as hereinafter specified, by connecting them with independent mineral monuments. At the same time, the position of any public-land corner which may be found in the neighborhood of the claim should be noted, so that, in case of the release of the township from suspension, the position of the claim can be shown on the plat.

137. A mineral survey must not be returned with its connection made only with a corner of the public survey, where the survey of the township within which it is situated is under suspension, nor connected with a mineral monument alone, when situated within the limits of a township the regularity and correctness of the survey of which is unquestioned.

138. In making an official survey, corner No. 1 of each location must be established at the corner nearest the corner of the public survey or mineral monument, unless good cause is shown for its being placed otherwise. If connections are given to both a corner of the public survey and mineral monument, corners Nos. 1 should be placed at the corner nearest the corner of the public survey. When a boundary line of a claim intersects a section line, courses and distances from point of intersection to the government corners at each end of the half mile of section line so intersected must be given.

139. In case a survey is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, a mineral monument must be established, in the location of which the greatest care must be exercised to insure permanency as to site and construction.

140. The site, when practicable, should be some prominent point, visible for a long distance from every direction, and should be so chosen that the permanency of the monument will not be endangered by snow, rock, or landslides, or other natural causes.

141. The monument should consist of a stone not less than 30 inches long, 20 inches wide, and 6 inches thick, set halfway in the ground, with a conical mound of stone 4 feet high and 6 feet base alongside. The letters U. S. M. M., followed by the consecutive number of the monument in the district, must be plainly chiseled upon the stone. If impracticable to obtain a stone of required dimensions, then a post 8 feet long, 6 inches square, set 3 feet in the ground, scribed as for a stone monument, protected by a well built conical mound of stone of not less than 3 feet high and 6 feet base around it, may be used. The exact point for connection must be indicated on the monument by an X chiseled thereon; if a post is used, then a tack must be driven into the post to indicate the point.

142. From the monument, connections by course and distance must be taken to two or three bearing trees or rocks, and to any well known and permanent objects in the vicinity, such as the confluence of streams, prominent rocks, buildings, shafts, or mouths of adits. Bearing trees must be properly scribed B. T. and bearing rocks chiseled B. R., together with the number of the mineral monument; the exact point on the tree or stone to which the connection is taken should be indicated by a cross or other unmistakable mark. Bearings should also be taken to prominent mountain peaks, and the approximate distance and direction ascertained from the nearest town or mining camp. A detailed description of the mineral monument, with a topographical map of its location, should be furnished the office of the surveyor general by the surveyor.

143. Corners may consist of:

First. A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone $1\frac{1}{2}$ feet high, 2 feet base, alongside.

Second. A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third. A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

144. All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The exact corner point must be permanently indicated on the corner. When a rock in place is used, its

dimensions above ground must be stated and a cross chiseled at the exact corner point.

145. In case the point for the corner be inaccessible or unsuitable, a witness corner, which must be marked with the letters W. C. in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes, and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

146. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks and other objects, as prescribed in the establishment of mineral monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

147. If an official mineral survey has been made in the vicinity, within a reasonable distance, a further connecting line should be run to some corner thereof; and in like manner all conflicting surveys and locations should be so connected, and the corner with which connection is made in each case described. Such connections will be made and conflicts shown according to the boundaries of the neighboring or conflicting claims as each is marked, defined and actually established upon the ground. The mineral surveyor will fully and specifically state in his return how and by what visible evidences he was able to identify on the ground the several conflicting surveys and those which appear according to their returned tie or boundary lines to conflict, if they were so identified, and report errors or discrepancies found by him in any such surveys. In the survey of contiguous claims which constitute a consolidated group, where corners are common, bearings should be mentioned but once.

148. The mineral surveyor should note carefully all topographical features of the claim, taking distances on his lines to intersections with all streams, gulches, ditches, ravines, mountain ridges, roads, trails, etc., with their widths, courses, and other data that may be required to map them correctly. All municipal or private improvements, such as blocks, streets, and buildings, should be located.

149. If, in running the exterior lines of a claim, the survey is found to conflict with the survey of another claim, the distances to the points of intersection, and the courses and distances along the line intersected from an established corner of such conflicting claim to such points of intersection, should be described in the field notes: Provided, that where a corner of the conflicting survey falls within the claim being surveyed, such corner should be selected from which to give the bearing, otherwise the corner nearest the intersection should be taken. The same rule should govern in the survey of claims embracing two or more locations the lines of which intersect.

150. A lode and mill-site claim in one survey will be distinguished by the letters A and B following the number of the survey. The corners of the mill site will be numbered independently of those of the lode. Corner No. 1 of the mill site must be connected with a corner of the lode claim as well as with a corner of the public survey or United States mineral monument.

151. When a placer claim includes lodes, or when several contiguous placer or lode locations are included as one claim in one survey, there must be given to the corners of each location constituting the same a separate consecutive numerical designation, beginning with No. 1 in each case.

152. Throughout the description of the survey, after each reference to the lines or corners of a location, the name thereof must be given, and if unsurveyed, the fact stated. If reference is made to a location in-

cluded in a prior official survey, the survey number must be given, followed by the name of the location. Corners should be described once only.

153. The total area of each location and also the area in conflict with each intersecting survey or claim should be stated. But when locations embraced in one survey conflict with each other, such conflicts should only be stated in connection with the location from which the conflicting area is excluded.

154. It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

155. The title page of the field notes must contain the post office address of the claimant or his authorized agent.

156. In the mineral surveyor's report of the value of the improvements, all actual expenditures and mining improvements made by the claimant or his grantors, having a direct relation to the development of the claim, must be included in the estimate.

157. The expenditures required may be made from the surface or in running a tunnel, drifts, or crosscuts for the development of the claim. Improvements of any other character, such as buildings, machinery or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of and actually facilitate the extraction of mineral from the claim.

158. All mining and other improvements claimed will be located by courses and distances from corners of the survey, or from points on the center or side lines, specifying with particularity and detail the dimensions and character of each, and the improvements upon each location should be numbered consecutively, the point of discovery being always No. 1. Improvements made by a former locator who has abandoned his claim cannot be included in the estimate, but should be described and located in the notes and plat.

159. In case of a lode and mill-site claim in the same survey, the expenditure of five hundred dollars must be shown upon the lode claim.

160. If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey, the mineral surveyor may file with the surveyor general supplemental proof showing five hundred dollars' expenditure made prior to the expiration of the period of publication.

161. The mineral surveyor will return with his field notes a preliminary plat on tracing paper, protracted on a scale of two hundred feet to an inch, if practicable. In preparing plats the top is north. Copy of the calculations of areas by double meridian distances and of all triangulations or traverse lines must be furnished. The lines of the claim surveyed should be heavier than the lines of conflicting claims.

162. Whenever a survey has been reported in error, the surveyor who made it will be required to promptly make a thorough examination upon the premises and report the result, under oath, to the surveyor general's office. In case he finds his survey in error, he will report in detail all discrepancies with the original survey and submit any explanation he may have to offer as to the cause. If, on the contrary, he should report his survey correct, a joint survey will be ordered to settle the differences with the surveyor who reported the error. A joint survey must be made within ten days after the date of order, unless satisfactory reasons are submitted, under oath, for a postponement. The field work must in every sense of the term be a joint and not a separate survey, and the observations and measurements taken with the same instrument and chain previously tested and agreed upon.

163. The mineral surveyor found in error, or, if both are in error, the one who reported the same, will make out the field notes of the joint survey, which, after being duly signed and sworn to by both parties, must be transmitted to the surveyor general's office.

164. Inasmuch as amended surveys are ordered only by special instructions from the general land office, and the conditions and circumstances peculiar to each separate case and the object sought by the required amendment alone govern all special matters relative to the manner of making such survey and the form and subject-matter to be embraced in the field notes thereof, but few general rules applicable to all cases can be laid down.

165. The amended survey must be made in strict conformity with, or be embraced within, the lines of the original survey. If the amended and original surveys are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of the amended survey to the corresponding corner of the original survey. The lines of the original survey, as found upon the ground, must be laid down upon the preliminary plat in such manner as to contrast and show their relation to the lines of the amended survey.

166. The field notes of the amended survey must be prepared on the same size and form of blanks as are the field notes of the original survey, and the word "amended" must be used before the word "survey" wherever it occurs in the field notes.

167. Mineral surveyors are required to make full examinations of all placer claims at the time of survey and file with the field notes a descriptive report, in which will be described:

(a) The quality and composition of the soil, and the kind and amount of timber and other vegetation.

(b) The locus and size of streams, and such other matter as may appear upon the surface of the claims.

(c) The character and extent of all surface and underground workings, whether placer or lode, for mining purposes, locating and describing them.

(d) The proximity of centers of trade or residence.

(e) The proximity of well known systems of lode deposits or of individual lodes.

(f) The use or adaptability of the claim for placer mining, and whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose.

(g) What works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(h) The true situation of all mines, salt licks, salt springs, and mill sites which come to the surveyor's knowledge, or a report by him that none exist on the claim, as the facts may warrant.

(i) Said report must be made under oath and duly corroborated by one or more disinterested persons.

168. The employing of claimants, their attorneys, or parties in interest, as assistants in making surveys of mineral claims will not be allowed.

169. The field work must be accurately and properly performed and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability for the faithful discharge of his duties, and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If

found incompetent as a surveyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

S. V. Proudft,
Acting Commissioner.

Approved March 29, 1909.
R. A. Ballinger,
Secretary.

COAL LANDS.

RULES AND REGULATIONS.

1. The sale of coal lands is provided for:
 - (a) By ordinary cash entry under section 2347;
 - (b) By cash entry under a preference right to purchase acquired by compliance with the provisions of section 2348.
2. Coal lands may be entered only after survey and by legal subdivisions. The lands must be vacant and unappropriated and must contain workable deposits of coal and must not be valuable for mines of gold, silver, or copper. Lands containing lignites are included under the term "coal lands."
3. Entry by an individual may be made only by a person above the age of 21 years who is a citizen of the United States or has declared his intention to become such, and shall not embrace more than 160 acres. Entry by an association of persons may embrace 320 acres, but each person composing the association must be qualified as in the case of an individual entryman. A corporation is held to be an association under the provisions of the coal-land law.
4. When an association of not less than four persons, severally qualified as required in the case of an individual entryman, shall have expended not less than \$5,000 in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding 640 acres, including such mining improvements.
5. But one entry of coal lands by any person or association of persons is allowed by the law. No person who, and no association any member of which, either as an individual or as a member of an association, shall have had the benefits of the law, may enter or hold any other coal lands thereunder. The right so to enter or to hold is exhausted, whether an entry embraces in any instance the maximum area allowed by the law, or less; also by the acquisition of a preference right of entry unless sufficient cause for the abandonment thereof is shown. Assignment of a preference right of entry under section 2348, Revised Statutes, will not hereafter be recognized.
6. Information will be furnished registers and receivers by the commissioner of the general land office of the price at which all coal lands in their respective districts will be offered. The local land offices will from time to time be furnished with schedules and maps (1) showing lands known to lie without ascertained coal areas and open to entry under the general land laws, according to the character of each particular tract; (2) showing lands known to contain workable deposits of coal, whereon prices will be fixed upon information derived from field examination; and (3) showing lands containing coal of such character as may, from their location at a distance from transportation lines, be sold at the minimum price fixed by the statute as hereinafter stated. For Classification and valuation, see 37 L. D. 653, 681.

Local land officers will allow coal entries for lands in the first and third classes at the minimum price fixed by the statute, and for those in the second class at the prices stated in the schedules and maps furnished them. Lands listed in classes 2 and 3 are subject to entry under the coal-land laws only, unless shown by the applicant to be of such character as to be subject to entry under some other law. For those lands listed as of the first and third classes (when entered under the coal land laws), the price is not less than \$10 per acre when situated more than 15 miles from a completed railroad and \$20 when situated within 15 miles of a completed railroad; and where the lands lie partly without such limit, the higher price must be paid for each smallest legal subdivision the greater part of which lies within 15 miles of such railroad. The term "completed railroad" is construed to mean a railroad actually constructed, equipped and operating at the date of entry. The distance is to be calculated from the point on such railroad nearest the lands applied for, and the facts in each case must be shown by the affidavit of the applicant, corroborated by the affidavit of some disinterested credible person having actual knowledge thereof.

7. A preference right of entry accrues only where a person or association of persons, severally qualified, have opened and improved a coal mine or mines upon the public lands and shall be in actual possession thereof and not by the filing of a declaratory statement. A perfunctory compliance with the law in this respect will not suffice, but a mine or mines of coal must be in fact opened and improved on the land claimed.

There is no authority under which a coal mine upon public lands, entry not having been made, may be worked and operated for profit and sale of the coal, or beyond the opening and improving of the mine as a condition precedent to a preference right under section 2348 of the Revised Statutes. To preserve a preference right of entry specified in the statute, the person or association of persons having acquired the same must present to the register of the proper land district, within sixty days of the date of actual possession and commencement of improvements upon the land, a declaratory statement therefor in all cases where the township plat has been filed. When the township plat is not on file at the date of such improvement, such declaratory statement must be presented within sixty days from the receipt of such plat at the district land office.

8. After entry has been allowed, the local officers have no authority to order a hearing or make further determination with respect to it, except upon instructions from the general land office. They will, however, receive all protests against it and promptly forward them, together with a statement of the facts shown by their records, for consideration and action.

9. Prior to entry it is competent for the local officers to order a hearing on sufficient grounds set forth under oath by any protestant.

10. When it is sought to purchase otherwise than in the exercise of a preference right, the party will himself make oath to the following application which must be presented to the register:

I,, hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, to purchase the quarter of section, in township of range, in the district of lands subject to sale at the land office at, and containing acres; and I solemnly swear that no portion of said tract is in the possession of any other party or parties who has or have commenced improvements thereon for the development of coal; that I am twenty-one years of age; a citizen of the United States (or have declared my intention to become a citizen of the United States), and have never held, except or purchased any lands under said act, either as an individual or as a member of an association; that I make this applica-

tion in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any other person or persons whomsoever; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof: that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains workable deposits of coal; that there is not to my knowledge within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

11. Where a preference right of entry is sought to be preserved, the required declaratory statement must be substantially as follows:

I,, do hereby declare my intention to purchase, in the exercise of a preference right, under the provisions of the Revised Statutes of the United States relating to the sale of the coal lands of the United States, the quarter section of township of range, in the district of the lands subject to sale at the district land office at; and I do solemnly swear that I am years of age and a citizen of the United States (or have declared my intention to become a citizen of the United States); that I have never, either as an individual or as a member of an association, held, except, or purchased any coal lands under the aforesaid provisions of the Revised Statutes; that I was in possession of, and commenced improvements on, said tract on the day of, A. D. 19...., and have ever since remained in actual possession continuously; that I have opened and improved a valuable mine of coal thereon, and have expended in labor and improvements on said mine the sum of dollars, the labor and improvements being as follows: (Here describe the nature and character of the improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described land and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

12. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment; but the local officers will allow no party to make final proof and payment except on special written notice to all others who appear on their records as claimants to the same tract. No notice will be given to parties whose declaratory statements have expired by limitation under the law.

13. A declarant will not be permitted to file after the expiration of the sixty days allowed nor to exercise a preference right of purchase after the expiration of the year.

14. When it is sought to purchase, in the exercise of a preference right, the applicant must himself make the following affidavit, which must be presented to the register:

I, claiming, under the provisions of the Revised Statutes of the United States relating to the sale of the coal lands of the United States, the preference right to purchase the quarter of section, in township of range subject to sale at the district land office at, hereby apply to purchase and enter the same; and I do solemnly swear that I have not hitherto held, except, or purchased, either as an individual or as a member of an association, any coal lands

under the aforesaid provisions of the law; that I have expended in developing coal mines on said tract, in labor and improvements, the sum of dollars, the nature of such improvement being as follows:; that I am now in the actual possession of said mines, and make the entry in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; That said land contains workable deposits of coal; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, or copper. So help me God.

15. Where purchase and entry, whether in the exercise of a preference right or otherwise, is made by an association, each member thereof must subscribe and swear to the application or affidavit, the necessary changes being made to cover the joint possession and expenditure and the purchase and entry in their joint interest.

16. Each application, declaratory statement and affidavit, forms whereof are given above, must be verified before the register or receiver, or some officer authorized by law to administer oaths, in the land district wherein the lands involved are situate. Under this regulation no verification can be made outside of such land district. (As amended April 20, 1908, 36 L. D. 368.)

17. Upon the filing of an application to purchase coal lands under the provisions of paragraphs 10 or 14, the applicant will be required, at his own expense, to publish a notice of said application in a newspaper nearest the lands, to be designated by the register, for a period of thirty days, during which time a similar notice must be posted in the local land office and in a conspicuous place on the land. The notice should describe the land applied for and state that the purpose thereof is to allow all persons claiming the land applied for, or desiring to show that the applicant's coal entry should not be allowed for any reason, an opportunity to file objections with the local land officers.

Publication must be made sufficiently in advance to permit entry within the year specified by the statute.

18. After the thirty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement (including an attached copy of the published notice) that the notice was published for the required period, giving the first and last date of such publication, and his own affidavit, or that of some credible person having personal knowledge of the fact, showing that the notice aforesaid remained conspicuously posted upon the land sought to be patented during said thirty days' publication, giving the dates. The register shall certify to the fact that the notice was posted in his office for the full period of thirty days, the certificate to state distinctly when such posting was done and how long continued, giving the dates. In no case shall entry be allowed until the proofs specified have been filed.

The claimant will be required within thirty days after the expiration of the period of newspaper publication to furnish the proofs specified in said paragraph and tender the purchase price of the land. Should the specified proofs and purchase price be not furnished and tendered within this time, the local land officers will thereupon reject the application subject to appeal. Furthermore, in the exercise of a preference right to purchase, no part of the thirty day' period specified herein may extend beyond the year fixed by the statute. (As amended November 30, 1907, 36 L. D. 192.)

19. Of the following forms, the one appropriate to the sections of the Revised Statutes under which application is made should be used for publication of all notices of application to enter coal lands:

NOTICE FOR PUBLICATION.

Coal Entry. (Sec. 2347, R. S.)

..... Land Office.
....., 19.....

Notice is hereby given that, of, County of, State (or Territory) of has this day filed in this office his application to purchase, under the provisions of section 2347, U. S. Revised Statutes, the of section No. township No., range No.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the sale thereof to applicant, should file their affidavits of protest in this office on or before the day of 19....., otherwise the application may be allowed.

..... Register.

NOTICE FOR PUBLICATION.

Coal Entry. (Secs. 2348-52, R. S.)

..... Land Office.
....., 19.....

Notice is hereby given that, of, county of, State (or Territory) of, who, on the day of, 19....., filed in this office his coal declaratory statement for the of section No., township No. range No., has this day filed in this office his application to purchase said land under the provisions of section 2348 to 2352, U. S. Revised Statutes.

Any and all persons claiming adversely the lands described, or desiring to object for any reason to the entry thereof by applicant, should file their affidavits of protest in this office on or before the day of 19.....

..... Register.

20. When it is sought to purchase, either by ordinary cash entry or in the exercise of a preference right, the register, if he finds the tract applied for is vacant, surveyed and unappropriated, and that the claimant has complied with all the laws and regulations relating to the acquisition of coal lands, will so certify to the receiver, stating the prescribed purchase price, and the applicant must then pay the same.

21. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the general land office, whence, if the proceedings are found to be regular, a patent will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, either by the commissioner at Washington or by the register at the district land office.

22. An application for cash entry will be subject to any valid adverse right which may have attached to the same land pursuant to section 2348, Revised Statutes.

23. Qualified persons or associations who are lawfully in possession of tracts of coal lands which are still unsurveyed may, under sections 2401, 2402, and 2403, Revised Statutes, as amended by the act of August 20, 1894, apply to the surveyor general for the survey of the township or townships, or portions thereof, embracing the lands claimed, to be specified

as nearly as practicable. Each such application must be accompanied by the affidavit of the applicant or applicants, duly corroborated by at least two competent persons, setting forth the qualifications of the former as claimant or claimants of the land, the facts constituting their possession, the character of the land, and such other facts in the case as are essential in that connection. If the surveyor general approves the application, he will thereupon transmit it to the general land office with the affidavits and his report.

24. The "Rules of practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior," will, as far as applicable, govern all cases and proceedings arising under the statutes providing for the sale of coal lands.

25. Local officers will report at the close of each month as "sales of coal lands" all filings and entries in separate abstracts, commencing with No. 1 and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal lands, they will continue the same without change.

PART II.

COAL LANDS IN ALASKA.

1. Persons or associations of persons locating or entering coal lands in the district of Alaska under the provisions of the act April 28, 1904 (33 Stat. 525), amendatory to the act of June 6, 1900 (31 Stat. 658), are required to possess the qualifications of persons or associations making entry under the general coal land laws of the United States, and are subject to the same limitations.

2. The lands must be vacant and unappropriated, and must contain deposits of coal, and must not be valuable for mines of gold, silver, or copper. Lands containing lignites are included under the term "coal lands."

3. Entry by an individual may be made only by a person above the age of 21 years, who is a citizen of the United States, and shall not embrace more than 160 acres. Entry by an association of persons may embrace 320 acres, but each person composing the association must be qualified as in the case of an individual entryman. A corporation is held to be an association under the provisions of the coal-land law.

4. When an association of not less than four persons, severally qualified as required in the case of an individual entryman, shall have expended not less than \$5,000 in working and improving a mine or mines of coal upon the public lands, such association may enter not exceeding 640 acres, including such mining improvements.

5. But one entry of coal lands by any person or association of persons is allowed by the law. No person who, and no association any member of which, either as an individual or as a member of an association, shall have had the benefits of the law, may enter or hold other lands thereunder. The right so to enter or hold is exhausted, whether an entry embraces in any instance the maximum area allowed by the law or less.

6. There is no authority under which a coal mine upon public lands, entry not having been made, may be worked and operated for profit and sale of the coal, or beyond the opening and improving of the mine as a condition precedent to the right to apply for patent.

7. The requirement of the statute with respect to the form of the tract sought to be entered is construed to mean that the boundary lines of each entry must be run in cardinal sections, i. e., due north and south and east and west lines, by reference to a true meridian (not magnetic), with

the exception of meander lines or meanderable streams and navigable waters forming a part of the boundary lines of a location. Those meander lines which form part of the boundary of a claim will be run according to the directions in the Manual of Surveying Instructions, but other boundary lines will be run in true east and west and north and south directions, thus forming rectangles, except at intersections with meandered lines.

8. The permanent monuments to be placed at each of the four corners of the tract located may consist of:

First. A stone at least 24 inches long, set 12 inches in the ground, with a conical mound of stone $1\frac{1}{2}$ feet high, 2 feet base, alongside.

Second. A post at least 3 feet long by 4 inches square, set 18 inches in the ground, and surrounded by a substantial mound of stone or earth.

Third. A rock in place; and, whenever possible, the identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, or other objects, permanent objects being selected for bearings whenever possible.

9. It is further provided by the first section of the act that within one year from the date of the passage of the act, or within one year from making the location, there shall be filed for record in the recording district and with the register and receiver of the land district in which the land is situated a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same. In other words, the notice should contain a complete description in every particular of the claim as it is marked and monumented upon the ground.

10. By the second section of the act the locator or his assigns is allowed three years from the date of filing the notice prescribed in the first section of the act within which to file an application with the local land officers for a patent for the land claimed. It will thus be seen that persons or associations of persons claiming coal lands in that district at the date of the passage of the act have four years from location or from the date of the act within which to present their applications for patent.

11. Persons or associations of persons who fail to record their notices within the time prescribed by the first section of the act, or fail to file application for patent in the time prescribed by the second section, forfeit their rights to the particular tract located.

12. With the application for patent the claimant must file a certified copy of the plat of survey and field notes thereof made by a United States deputy surveyor or a United States mineral surveyor, duly approved by the surveyor general for the district of Alaska. Under this clause of the act it will be allowable for the claimant, at his own expense, to procure the making of a survey by one of the officials mentioned without first making application to the surveyor general, but the survey when made is to be submitted to and approved by the surveyor general and by him numbered serially.

13. The survey must be made in strict conformity with or be embraced within the lines of the location as appears from the record thereof with the recorder in the recording district, and must be made in accordance with the regulations relative to lode and placer mining claims so far as they are applicable.

14. Upon the presentation of an application for patent, if no reason appears for rejecting it, it will be received by the register and receiver and the claimant required to publish a notice thereof for the period of sixty days in a newspaper in the district of Alaska published nearest the location of the particular lands, and to cause a copy thereof, together with a certified copy of the official plat of survey, to be posted and remain posted throughout the period of publication in a conspicuous place upon the land applied for, and the register will post a copy of such notice and

official plat in his office for the same period. When the notice is published in a weekly newspaper, nine consecutive insertions are necessary; when in a daily newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

15. The notice so published must embrace all the data given in the notice posted upon the claim and in the local land office. In addition to such data, the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, if there is one, and fix the boundaries of the claim by courses and distances.

The publication in the newspaper and the posting upon the land and in the local land office must cover the same period of time.

16. Upon the expiration of the sixty day period prescribed, the claimant may file in the local land office a sworn statement from the office of publication, to which shall be attached a copy of the notice published, to the effect that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during the sixty day period of publication, giving the dates. The register will also file with the record a certificate showing that the notice and plat were posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

Not earlier than six months after the expiration of the period of publication, if no objections are interposed or adverse claim filed, entry may be allowed upon payment of the price per acre specified by the act, which is \$10 per acre in all cases.

17. The proviso to the second section of the act is as follows:

That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

The term "shore" is defined to mean the land lying between high and low-water marks of any navigable waters within said district.

18. Section 3 provides for the assertion by any person or association of persons of an adverse claim, and requires that such adverse claim shall be filed during the period of posting and publication or within six months thereafter, that it shall be under oath, and set forth the nature and extent thereof.

19. An adverse claim may be verified by the oath of the adverse claimant or by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated, and when verified by such agent or attorney in fact he must distinctly swear that he is such agent or attorney in fact and accompany his affidavit by proof thereof. The adverse claimant should set forth fully the nature and extent of the interference or conflict by filing with his adverse claim a plat showing his entire claim and its situation or position with relation to the one against which he claims; whether he claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance or duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or, if the transaction was a merely verbal one, he will narrate the circumstances attending the purchase, the date thereof, and amount paid, which facts will be supported by the affidavits of one or more witnesses, if any were present at the time; and if he claims as locator, he must file a duly certified copy of the location notice from the office of the proper recorder and his affidavit of continued ownership.

20. Upon the filing of such adverse claim within the sixty days period of posting and publication, or within six months thereafter, the party

who files the adverse claim shall, under the act, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska.

21. All papers filed should have endorsed upon them the precise date of filing; and upon the filing of an adverse claim within the time prescribed by the statute, all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notice and plat and filing the necessary proof thereof, until adjudication of the rights of the parties. In cases of final judgment rendered the party entitled under the decree must, before he is allowed to make entry, file a certified copy thereof.

22. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient. Where no suit has been commenced against the application for patent within the statutory period, a certificate to that effect by the clerk of the territorial court having jurisdiction will be required.

23. In connection with the foregoing, it is to be borne in mind that by section 4 of the act it is declared:

That all the provisions of the coal-land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska.

24. An assignment to a qualified person of a preference right of entry under the act of April 28, 1904, will be recognized when properly executed. Proof and payment by the assignee must be made, however, in the same manner and within the same time as though there had been no assignment.

25. The following forms for notice of location and application for patent should be used:

NOTICE OF LOCATION.

I,, of, having on the day of 19...., opened and improved a coal mine on the following-described tract (here describe the lands by metes and bounds in rectangular form with north and south boundary lines run according to the true meridian, and a reference to such natural or permanent objects as will readily identify the same), do hereby locate the same as provided by the Alaska coal-land act of April 28, 1904 (33 Stats. 525); and I do solemnly swear that I am a citizen of the United States (or have declared my intention to become a citizen of the United States); that I am over the age of 21 years; that I have never either as an individual or as a member of an association held, except, or purchased any coal lands of the United States; that I have remained in actual possession of said land continuously since the day of, 19....; that I have expended in labor and improvements on said mine the sum of dollars, the labor and improvements being as follows (here describe the nature and character of such improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described lands and with each and every portion thereof; that my knowledge of said lands is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, copper, or other valuable minerals, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, or copper or other minerals. So help me God.

Dated, 19....
(Jurat).

.....

APPLICATION FOR PATENT.

I,, claiming under the provisions of the act of April 28, 1904 (33 Stats. 525), amendatory of the act of June 6, 1900 (31 Stats. 658), extending the coal-land laws to the District of Alaska, do hereby apply to purchase the lands described in the accompanying field notes and plat and subject to sale at the district land office at, Alaska; and do solemnly swear that my title to said tract is as follows: as will more fully appear by the certified copy of location notice and abstract of title filed herewith; that I am above the age of 21 years, and a citizen of the United States; that I have not hitherto held, except, or purchased, either as an individual or as a member of an association, any coal lands under the provisions of the coal-land laws; that I have expended in developing coal mines on said tract, in labor and improvements, the sum of dollars, the nature of said improvements being as follows:; that I am now in the actual possession of said mines and make the entry in good faith for my own benefit, and not, directly or indirectly, in whole or in part, in behalf of any person or persons whomsoever; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every portion thereof; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains deposits of coal; that there is not, to my knowledge, within the limits thereof any valuable vein or lode of quartz or other rock in place bearing gold, silver, copper, or other valuable minerals, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, copper or other minerals. So help me God.

.....

(Jurat).

26. The notice of location and the application for patent, the forms of which are given above, may be sworn to by the claimant before any officer authorized by law to administer oaths, but the authority of said officer must be properly shown.

27. Any party duly qualified under the law, after swearing to his notice of location or application for patent, may, by a sufficient power of attorney duly executed under the laws of the state or territory in which such party may be then residing, empower an agent to file with the register of the proper land office the notice of location or application for patent, and also authorize him to make payment for and entry of the lands in the name of such qualified party; and when such power of attorney shall have been filed in the local land office, such agent may act thereunder as indicated. (As amended March 20, 1909, 37 L. D. 508.)

28. Where a claimant shows by affidavit that he is not personally acquainted with the character of the land, any qualified person may make the required affidavit as to its character; but whether this affidavit is made by the claimant or by another, it must be corroborated by the affidavits of two disinterested and credible witnesses having personal knowledge of the facts.

29. The "Rules of practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior," will, as far as applicable, govern all cases and proceedings arising under the statutes providing for the sale of coal lands.

30. Local officers will report at the close of each month as "sales of coal lands" all filings and entries in separate abstracts, commencing with number one and thereafter proceeding consecutively in the order of their reception.

Where a series of numbers has already been commenced by sale of coal lands, they will continue the same without change.

R. A. Ballinger,
Commissioner.

Approved April 12, 1907,
James Rudolph Garfield,
Secretary.

COAL LANDS IN ALASKA—ACT OF MAY 28, 1908.

CIRCULAR.

Department of the Interior, General Land Office,
Washington, D. C., July 11, 1908.

Registers and Receivers, United States Land Offices, and United States
Surveyor-General, District of Alaska.

Gentlemen:

Herewith is a copy of act of Congress approved May 28, 1908 (Public, No. 151), relating to existing unpatented coal claims in the District of Alaska.

CONSOLIDATION OF CLAIMS, MAXIMUM AREA. The said act provides a method whereby qualified persons, their heirs or assigns, who initiated coal claims in Alaska prior to November 12, 1906, may consolidate their claims through the means of associations or corporations which may perfect entry and acquire title to contiguous locations, such consolidated claims not to exceed 2,560 acres of contiguous lands nor to exceed in length twice the width of the tract thus consolidated and applied for.

QUALIFICATIONS OF APPLICANTS FOR CONSOLIDATED CLAIM. When application is made by an association of persons, each member thereof must be shown to be qualified to make entry under the coal land laws applicable to Alaska and to be the owner by location, inheritance or purchase of an undivided interest in the consolidated claim. Proof of the qualifications of the applicants may consist of their own affidavits. The application for patent may be executed and filed by the duly authorized agent of the members of the association.

A corporation applying to consolidate its claims must show at date of application that not less than seventy-five per cent of its stock is held by persons qualified to enter coal lands in Alaska, and to this end each such application must be accompanied by a list of the stockholders, showing their respective holdings of stock in the corporation, and the personal affidavits of those holding such seventy-five per cent of the capital stock, showing their qualifications under the law. Applications by corporations must be signed by the president and secretary and attested by the corporate seal. All applications may be upon form 3-367, modified to suit conditions.

PENDING ENTRIES. Claims embraced in unpatented entries, if the entrymen shall so elect, may be consolidated into a single entry under this act, upon presentation of a proper application therefor, within twelve months from date hereof. In the event of such consolidation, no further payment, publication of notice, nor any new or additional survey of the claims embraced in the consolidated entry, will be required; but the application must be accompanied by a plat of the claims as consolidated, by proof of the qualifications of the applicants, and by evidence of the assignment of the claims to the applicants.

ASSIGNMENTS. Assignments to individuals or corporations under the provisions of the act of May 28, 1908, must be executed in accordance with local requirements, and all applications be accompanied by abstracts of title properly certified.

SURVEYS. Where locations already surveyed are sought to be consolidated, the application must be accompanied by a plat showing the separate locations included in the consolidation and their relation to each other. One entry may then be made for the consolidated claim. Where unsurveyed claims are consolidated, the survey may describe the exterior limits of the consolidated claim as in the case of the exterior limits of the survey of one location, but the field notes of survey must be accompanied by duly certified copies of the location notices of the included claims and must show that the survey is made substantially in accordance with the aggregate locations. Consolidated claims need not be surveyed in perfect squares or parallelograms, but the length of the consolidated claim must not exceed twice the width, length and width to be measured in straight lines.

TIME WITHIN WHICH APPLICATION TO ENTER MUST BE MADE. Application for patent for consolidated claims may be accepted if filed within three years from date of the latest recorded notice of location of the included claims, exclusive of the period of suspension between November 12, 1906, and August 1, 1907 (Circular, May 16, 1907, 35 L. D. 572). In case of consolidation of claims, including both claims for which no application for patent has been filed and claims for which applications have been made, the application under the provisions of this act must be filed within three years from date of the latest recorded notice of location of the included claims, exclusive of the period of suspension hereinbefore mentioned. In case of consolidation of claims for all of which applications for patent have already been filed, final proof, payment, and entry must be made within six months after the expiration of the period of six months prescribed by section 3 of the act of April 28, 1904, for the filing of adverse claims, has elapsed, in case of all the included applications, or within six months after the final adjudication of the rights of the parties in adverse suits instituted with respect to any or all of such included applications: Provided, that in those cases wherein the time here specified has expired, applications to consolidate must be filed within six months from date hereof.

SECTION THREE OF ACT. Inasmuch as section three deals exclusively with such coal lands or deposits as shall have been purchased under this act, its interpretation seems more properly to fall within the province of the department of Justice, and it is deemed inadvisable for this department to attempt at this time to define its provisions.

ACT APRIL 28, 1904 (33 STAT. 525). So far as not in conflict with or superseded by the act of May 28, 1908, the act of April 28, 1904, will govern the survey, application and entry of the coal claims described in these instructions.

PATENTS. Patents issued under the provisions of the act of May 28, 1908, will contain recitals of the terms and conditions imposed by sections 2 and 3 of the act.

Very respectfully,

S. V. Proudft,
Acting Commissioner.

Approved:

Frank Pierce,
First Assistant Secretary.

INSTRUCTIONS.

Department of the Interior,
General Land Office,
Washington, D. C., April 24, 1907.

Registers and Receivers, United States Land Offices.

Sirs:

The following instructions are issued for your guidance:

Coal Lands.

1. Lands heretofore withdrawn from coal entry and not released from such withdrawals shall be entered on the tract books as "coal lands."

2. No entries of lands so noted shall be permitted under the coal-land laws until the maps and lists, as hereinafter mentioned, are filed in the local land office. Provided, however, such lands are now open for location and entry under the general mining laws for valuable deposits of gold, silver, or copper, notwithstanding the fact that they may also contain workable deposits of coal. Lands noted on the tract books as coal lands may, if nonmineral in character, be entered under the appropriate land laws, but no final proof or entry will be allowed until receipt of a report from a field officer, in accordance with instructions from the commissioner of the general land office, unless said lands have been restored to entry as hereinafter provided.

3. You will be furnished, from time to time, township maps showing the coal lands in the prospective townships, containing thereon the price at which such coal lands will be sold. Lands not enumerated and priced as "coal lands" in any such township map shall be treated as restored to entry under the general land laws, and you will so note on your tract books. Upon the filing of such maps, coal claims may be received, as provided by the regulations of April 12, 1907 (35 L. D. 665), within the townships covered thereby.

All coal filings made within sixty days prior to withdrawals from coal entry may be completed within the time prescribed by the statutes, less the time from date of such withdrawals to date of special written notice of filing of the maps and lists in the local office, as herein provided, such notice to be given by you to all persons entitled thereto. Also all persons who had, within sixty days prior to such withdrawal, opened and improved a coal mine upon public surveyed lands may file within the statutory period allowed, less that covered by the withdrawal. Claims upon unsurveyed lands classed as coal lands must be presented for filing within sixty days after the filing of the plat of survey, if the maps and plats are filed before the survey, or, after the lands have been surveyed, within sixty days after the filing of the maps and lists herein required in the local office, if the maps and lists are filed after the survey. However, in cases of valid and existent rights, the price per acre to be paid will be the minimum price fixed by statute.

Lands Not "Coal Lands."

4. Lands not listed as "coal lands," as hereinbefore mentioned, may be entered under any of the public land laws applicable to the particular tract. If any of these lands are found to contain workable deposits of coal they may be entered under the provisions of the coal land circular of April 12, 1907, at the minimum price fixed by the statute.

Action Required by Special Agents.

5. In all cases of application to make final proof, final entry, or to purchase public lands under any public land law, the register and receiver

will at once forward a copy thereof to the chiefs of field division of special agents. Such copy will be endorsed "coal lands" or "not coal lands," as the case may be. Where the land is in a national forest or other reservation, a second copy will be forwarded to the officer in charge thereof.

6. Registers and receivers will not issue final certificate or its equivalent in any case until the copy of notice mentioned in paragraph 5 is returned with the chief of field division's indorsement thereon. The chief of field division will in every case return the copy of notice prior to date for final proof or purchase.

7. When the copy of notice is returned with an indorsement not protesting the validity of the entry, the register and receiver will act upon the merits of the proof as submitted. Where the returned indorsement of chief of field Division or other officer protests the validity of the entry, the register and receiver will forward all papers to this office without action.

8. The chief of field division on receipt of such copy of notice will make a case thereof on his docket, and also make a field examination in the following cases:

(a) Cases wherein he has reason to believe a particular entry is fraudulent.

(b) Cases wherein the register and receiver have reason to believe a particular entry is fraudulent and have indorsed that fact upon the copy of the notice.

(c) Cases other than coal entries in lands classed as coal lands.

Chiefs of field division will exert every effort to make the field examination prior to date for final proof.

9. In cases not within paragraph 8, the chief of field division will return such copy of notice indorsed over his signature "no protest against validity of this entry." In cases under paragraph 8 he will return to the register and receiver the copy of notice indorsed "protest against the validity of this entry is filed in this office." If investigation is completed before date for final proof, he will so notify the register and receiver by letter; and if investigation is unfavorable to entry, he will submit his report to this office.

The circulars of January 21, 1907, March 15, 1907, and all parts of the circular of December 7, 1905, in conflict herewith, and all other regulations and circulars in conflict herewith, are hereby revoked.

Very respectfully,

R. A. Ballinger,
Commissioner.

Approved April 24, 1907.

James Rudolph Garfield,
Secretary.

CIRCULAR.

Department of the Interior,
General Land Office,
Washington, D. C., May 16, 1907.

Register and Receiver, Juneau, Alaska,
Gentlemen:

The following instructions are issued for your guidance:

1. Under the order of November 12, 1906, withdrawing lands in Alaska from entry, location, or filing under the coal-land laws, and subsequent modifications of said order, no lands in Alaska known to contain workable deposits of coal can be entered, located, or filed upon while such orders remain in force, except as hereinafter provided.

2. All qualified persons or associations of qualified persons who had within one year prior to November 12, 1906, in good faith made legal and valid locations under the act of April 28, 1904, may file notices of such locations in the manner and within the time prescribed by said act, if such notices have not already been filed and such locations have not been abandoned or forfeited; and they or any other person or persons to whom they may lawfully assign their rights after such notices have been filed may thereafter proceed to make entry and obtain patent within the time and in the manner prescribed by law.

3. In computing the time within which notices of location may be filed under the preceding paragraph, the time intervening between November 12, 1906, and August 1, 1907, will not be taken into consideration or counted, but such notices may be filed within one year from the date of location exclusive of such time.

4. All qualified persons or associations of qualified persons who may have in good faith legally filed valid notices of location under the act of April 28, 1904, prior to November 12, 1906, and the bona fide qualified assignees of such persons, may make entry and obtain patent under such notices within the time and in the manner prescribed by statute if they have not abandoned their right to do so.

5. In computing the time within which persons or associations of persons mentioned in the preceding paragraph may apply for patent, the time intervening between November 12, 1906, and the day on which they receive the written notices given by you as hereinafter required will not be considered or counted, and such applications may be made at any time within three years from the date on which such notices of location were filed exclusive of such time.

6. You are directed to at once notify all persons or associations of persons who have filed notices of location in your office, including those who have pending applications for patent, and all persons or associations of persons holding as assignees under such locations who have notified you of such assignments, of their right to proceed in the manner herein prescribed and authorized, and to furnish them with a copy of these instructions. These notices must be served either personally or by registered mail, and you should carefully preserve with the record in each case the registry return receipt or other evidence of such notice.

7. In all cases where you publish notice of applications for entry or patent under the coal-land laws, or under any other law, you will at once mail a copy of said notice to a special agent assigned to duty in Alaska. Should said agent thereafter file in your office a protest against the validity of the location or claim embraced in any such application, you will defer action upon such application until said protest is withdrawn or appropriate action is taken thereon.

Very respectfully,

R. A. Ballinger,
Commissioner.

Approved:

James Rudolph Garfield,
Secretary.

INSTRUCTIONS.

Department of the Interior,
General Land Office,
Washington, D. C., May 20, 1907.

Register and Receivers, United States Land Offices.

Sirs:

The following instructions are issued for your further guidance in cases arising under the coal-land laws:

1. As soon as the maps showing the character of any part of any township or townships within your respective districts have been furnished

you as prescribed in the coal-land regulations, approved April 12, 1907 (35 L. D. 665), you will at once post in your office a list of such townships, and furnish a copy of such list to the newspapers in your district for publication as a matter of news, but without cost to the government for such publication.

2. You are also directed to mail a copy of these instructions and a copy of the instructions of April 24, 1907 (35 L. D. 681), to all persons or associations of persons shown by your record to have or claim any interest in any land covered by any pending application to purchase under the coal-land laws or embraced in any valid unexpired coal declaratory statement.

All qualified persons or associations of qualified persons who legally and in good faith went into possession of and improved coal mines within less than sixty days preceding the date when the lands upon which such mines are situated were withdrawn from coal entry, and who have not filed declaratory statements, may at once, or within the time prescribed by statute, namely, within sixty days after the date of actual possession, and the commencement of improvements on the land, not counting the time intervening between date of withdrawal and July 1, 1907, file such declaratory statements and proceed to obtain patent in the manner, at the minimum price, and within the time fixed by law, regardless of the fact that the maps required by the coal-land regulations of April 12, 1907, may not have been filed in your office, and regardless of the fact that a higher price may have been fixed for such lands under such regulations.

4. All qualified persons or associations of qualified persons who in good faith filed legal declaratory statements in your office prior to the date on which the lands covered thereby were withdrawn from coal entry, and all qualified persons legally holding as assignees under any such declaratory statement by assignment made prior to April 12, 1907, may proceed to obtain title in the manner, at the minimum price, and within the time fixed by the statute, namely, fourteen months after the date of actual possession and the commencement of improvements on the land, not counting the period intervening between date of withdrawal and the mailing of copies of regulations as prescribed by paragraph 2 hereof, regardless of the fact that the maps required by the coal-land regulations of April 12, 1907, may not have been filed in your office at the date upon which application to purchase is presented, and regardless of the fact that a higher price may have been fixed for the lands claimed under said regulations.

All parts of regulations in conflict herewith are hereby revoked.

Very respectfully,

R. A. Ballinger,
Commissioner.

INSTRUCTIONS.

Department of the Interior,
General Land Office,
Washington, D. C., March 21, 1908.

Registers and Receivers,
United States Land Offices.

Sirs:

Lands noted on the tract books as "coal lands" under direction of circular dated April 24, 1907 (35 L. D. 681), are not subject to disposal under the coal land laws prior to their restoration to such entry by the filing in your office of classification maps and lists of such lands, except as provided in circular of May 20, 1907 (35 L. D. 683); but it is hereby directed that where a qualified person or association of persons has gone upon such lands since their withdrawal and disclosed coal deposits and

opened and improved a coal mine or mines thereon, such persons or association of persons will be permitted to file in the proper land office a notice of claim, which notice should briefly give the address of the claimant; the date of actual possession and commencement of improvements; the date upon which the mine was opened and improved; the character, value, and extent of such improvements; the description by legal subdivisions of the land claimed, which should not exceed the maximum area which may be entered and purchased under the coal land laws; and a declaration of intention to claim said tract upon its restoration under and conformably to such coal land laws and regulations and at such price and upon such terms and conditions as may be in force at the time of said restoration.

Upon the filing of any such notice of claim you will make pencil notations thereof upon the plats and tract books of your office and when classification maps and lists embracing such lands are filed in your office, as provided for in the circular of April 24, 1907 (35 L. D. 681), you will notify such claimant by registered mail, at the address given in his notice of claim, of the restoration, price, terms, and conditions upon which he may file upon, purchase and enter said lands, or the coal deposits therein, allowing him sixty days from the date of such notice within which to assert formal claim thereto under the coal land laws, advising him that upon failure to avail himself of the privilege thus extended the lands and deposits therein will be disposed of without regard to his prior notice of claim filed hereunder.

Very respectfully,

Fred Dennett, Commissioner.

Approved:

James Rudolph Garfield,
Secretary.

INSTRUCTIONS.

Department of the Interior.
General Land Office,
Washington, D. C., June 27, 1908.

Registers and Receivers,
United States Land Offices, Alaska.

Sirs:

The instructions of the General Land Office dated March 3, 1908, relative to the time within which applications to purchase coal lands in Alaska under the act of April 28, 1904 (33 Stat. 525), must be perfected, is amended to read as follows:

Your attention is called to the fact that the coal land law of April 28, 1904 (33 Stat. 525), provides that locators or their assigns may, at any time within three years after filing the notice prescribed by the first section of the act, make application for patent for the land claimed.

This does not mean that, if the application is filed at an earlier time than that allowed, the claimant may defer payment for his claim and making entry for a period of time which added to the time between filing the location notice and submitting the application for patent, will equal three years.

When the claimant files his application for patent he waives the unexpired portion of the three years fixed by the statute and must, thereafter, diligently proceed to make publication and submit the proofs prescribed by the statute and the regulations.

Paragraph 16 of the regulations of April 12, 1907 (35 L. D. 673), provides that payment and entry may be made not earlier than six months after the expiration of the period of publication. The law does not contemplate that this time be extended an unreasonable period at the option

of the claimant, but that after the filing of the application the case proceed regularly to entry. Accordingly, should the specified proofs and purchase price be not furnished and tendered within six months from the expiration of the six months within which adverse claims may be filed, or within six months after the final termination of adverse proceedings instituted under section 3 of the act, you will reject the application subject to appeal: Provided, that the period of six months herein fixed within which to perfect entry shall be allowed in case of pending applications which have not been perfected within the ninety days specified by the instructions of March, 3, 1908, the time to run from date hereof.

This is not intended in any way to modify the circular instructions of May 16, 1907 (35 L. D. 572), copy enclosed herewith.

Very respectfully,

S. V. Proudft.
Acting Commissioner.

Approved:

Frank Pierce,
Acting Secretary.

REGULATIONS.

Department of the Interior,
Washington, D. C., April 10, 1909.

1. For the purposes of classification and valuation, coal deposits shall be divided into four classes:

- (A) Anthracite, semianthracite, coking, and blacksmithing coals;
- (B) High grade bituminous noncoking coals having a fuel value of not less than 12,000 B. T. U. on an unweathered, air-dried sample;
- (C) Bituminous coals having a fuel value of less than 12,000 B. T. U. on an unweathered, air-dried sample, and high grade sub-bituminous coals having a fuel value of more than 9,500 B. T. U. on an unweathered, air-dried sample;
- (D) Low-grade sub-bituminous coals having a fuel value below 9,500 B. T. U. on an unweathered, air-dried sample, and all lignite coals.

Classification of Coal Lands.

2. Lands underlain by coal beds, none of which contain 14 inches or over of coal, exclusive of partings, of class A. B., or C, or over 36 inches of class D, shall be classed as noncoal land.

3. Lands containing coals of classes A and B of any thickness at depths greater than 3,000 feet shall be classified as noncoal lands, except where the rocks are practically horizontal and the coal lies within two miles of the outcrop or point at which it can be reached by a 3,000-foot shaft.

4. Lands containing coals of class C of any thickness at a depth greater than 2,000 feet shall be classed as noncoal land, except where the rocks are practically horizontal and the coal lies within two miles of the outcrop or point at which it can be reached by a 2,000-foot shaft.

5. Lands containing coals of class D of any thickness at a depth greater than 500 feet shall be classed as noncoal land, except where the rocks are practically horizontal and the coal lies within one mile of the outcrop or point at which it can be reached by a 500-foot shaft.

Valuation of Coal Lands.

6. The price of coal lands of classes A, B, and C shall be determined on the basis of estimated tonnage at the rate of one-half to 1 cent per estimated ton for class C; 1 to 2 cents per estimated ton for class B; and 2 to 3 cents per estimated ton for class A, when the lands are within

fifteen miles of a completed railroad, and half that much when at a greater distance, but the price shall in no case exceed \$300, except in districts which contain large coal mines where the character and extent of the coal are well known to the purchaser. When, however, topographic conditions affect the accessibility of the coal, the land within the 15-mile limit may be given a lower valuation, but in no case shall it be placed at less than the minimum.

7. The rates per ton in the preceding paragraph are based on the assumption that only one bed of coal is present. If more than one bed occurs in any tract of land in such relationship that the mining of one will not necessarily disturb the other, then for the second bed there shall be added to the price of the first bed 60 per cent of the value of the second bed according to the schedule, 40 per cent of the value of the third, and 30 per cent of the value of each additional bed, but the estimated price for coal shall in no case exceed \$300, except in districts which contain large coal mines where the character and extent of the coal deposits are well known to the purchaser.

8. The tonnage shall be estimated for the purpose of valuation on the basis of 1,000 tons recovery per acre-foot.

9. The coal price of lands of class D shall be the minimum provided by law, \$20 per acre when within fifteen miles of a railroad and \$10 per acre when at a greater distance.

10. In all valuations of coal lands any special conditions enhancing the value of the land for coal mining purposes shall be taken into consideration.

11. When only a part of a smallest legal subdivision is underlain by coal, the price per acre shall be fixed by dividing the total estimated coal values by the number of acres in the subdivision, but in no case shall this be less than the minimum provided by law.

12. When lands which were at time of classification more than fifteen miles from a railroad are brought within the 15-mile limit by the beginning of operation of a new road, all values given in the original classification shall be doubled by the register and receiver.

13. Except in case of entries now pending, or entries made prior to classification, review of classification or valuation may be had only upon application therefor to the secretary, accompanied by a showing clearly and specifically setting forth conditions not existing or known at time of examination.

Approved:

R. A. Ballinger, Secretary.

INSTRUCTIONS.

Department of the Interior.

General Land Office.

Washington, D. C., September 7, 1909.

Registers and Receivers,

United States Land Offices.

Gentlemen:

The circular of May 8, 1909 (37 L. D. 681), construing paragraph 13 of the circular approved April 10, 1909 (37 L. D. 653), entitled "Regulations regarding the Classification and Valuation of Coal Lands," is modified to read as follows:

1. You will advise any person presenting a nonmineral application or filing for lands classified in schedules and on maps as containing workable deposits of coal subject to disposal at prices fixed, that he will be allowed thirty days in which to submit such evidence as he can, preferably the sworn statements of expert or practical miners, showing that the land is in fact not coal in character, together with a request that the same be reclassified, and that in the event of failure to furnish said evi-

dence within the time specified, the application will be rejected. Such applications will be given proper serial numbers, and notation thereof made upon the records, and, when accompanied by the necessary evidence, they will be forwarded to the general land office for action, where, if upon the showing made, and such other inquiry as may be deemed proper, the land is classified as agricultural land, the nonmineral application, in the absence of other objections, will be returned for allowance. If reclassification be denied, the applicant may, within thirty days from receipt of notice, apply for a hearing, at which he may be afforded an opportunity for showing that the classification is improper, in which event he must assume the burden of proof. If he should fail to apply for a hearing within the time allowed, his application to enter or file will be finally rejected.

2. Nonmineral applications for lands temporarily withdrawn from all entry, where such temporary withdrawal is based upon data in possession of the department, showing that the lands withdrawn are valuable for coal, may be treated in like manner as nonmineral applications for lands actually classified. However, in such cases, as the lands are withdrawn pending classification, it is possible that the particular tract applied for by the agricultural claimant may not be classified as coal land, and in that event, of course, no hearing will be necessary, and in such cases, therefore, the agricultural applicant may, at his election, tender his application unaccompanied by the evidence specified in paragraph 1, and have the same suspended to await the result of its classification. If the land applied for is classified as coal land, the agricultural claimant will then be allowed to proceed as provided in paragraph 1 hereof, and should he then be unable to show that the land is not in fact coal in character, his nonmineral application or filing will be rejected, and in such case the right of election mentioned in the act of March 3, 1909 (35 Stat. 844), for the protection of the surface rights of entrymen, will not be allowed.

3. Lands noted on your records merely as "withdrawn" coal lands may be entered under the agricultural laws as provided by the last sentence of paragraph 2 of the circular of April 24, 1907 (35 L. D. 681). The instructions of April 24, 1907, *supra*, are modified accordingly.

Very respectfully,

S. V. Proudfit,
Acting Commissioner.

Approved:

R. A. Ballinger,
Secretary.

REGULATIONS.

Department of the Interior,
Geological Survey,
Washington, D. C., January 7, 1910.

The Honorable,
The Secretary of the Interior,
Sir:

I recommend the following addition to paragraph 7 of the regulations regarding the classification and valuation of coal lands, approved by you April 10, 1909 (37 L. D. 653):

Where a bed is over 15 feet thick, the normal value shall be placed only on 15 feet; the next 15 feet or part thereof shall be valued at 60 per cent of the normal; the next 15 feet or part thereof at 40 per cent of the normal; and the rest of the bed at 30 per cent of the normal.

The reason for this modification is that for mining purposes a bed less than 15 feet thick is worth more per foot than a bed of greater thickness. The addition proposed above results from considering a thick bed as a multiple bed.

Very respectfully,

Geo. Otis Smith, Director.

Approved, January 8, 1910:

R. A. Ballinger, Secretary.

REGULATIONS.

Department of the Interior,
Geological Survey,
Washington, D. C., February 10, 1910.

The Honorable,

The Secretary of the Interior,

Sir:

In the regulations regarding the classification and valuation of coal lands, approved by you on April 10, 1909 (37 L. D., 653), a minimum thickness of 14 inches of coal, exclusive of partings, is fixed for classes "A," "B," and "C," and a minimum of 36 inches for class "D." In some of the western fields class "C" grades into class "D" by so imperceptible steps that there is a transition zone of many miles between the two, and an inconsistency results in classing coal in the same field on one side of a line which is determined by a calorific value on a basis of 14 inches, and on the other side of the line on a basis of 36 inches. I am also of the opinion that 14 inches is too thin for some of the lower grade "C" coals.

To correct these matters, I recommend that for paragraph (2) in the existing regulations, which reads: "Land underlain by coal beds none of which contain 14 inches or over of coal, exclusive of partings, of class A, B or C, or over 36 inches of class D, shall be classified as noncoal land," there be substituted:

Lands underlain by coal beds which contain 14 inches or over of clean coal, exclusive of partings, shall be classified as coal land where the coal shows a calorific value of 10,500 B. T. U. or over on an unweathered air-dried sample; for coals having a less calorific value the minimum thickness shall be increased one inch for every decrease of 100 B. T. U. below 10,500. Thus, the minimum thickness of a coal having a B. T. U. value of 8,500 on an unweathered air-dried sample will be 34 inches.

Very respectfully,

Geo. Otis Smith, Director.

Approved, February 10, 1910:

R. A. Ballinger, Secretary.

INDEX.

As this volume is merely supplemental to volume one, the index in that volume is a complete index to both. Having found what you are looking for in that volume, turn to the corresponding page in this volume (as indicated by the black letter figures at the beginning of each paragraph). There you will find the new cases or statutes reiterating, modifying, adding to or reversing propositions stated in the original volumes.

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